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JUDGES OF THE HIGH COURT.

JULY—DECEMBER, 1937.

Chief Justice.

The Hon'ble Mr. Alfred Henry Lionel Leach (*Barrister-at-Law*).

Puisne Judges.

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The Hon'ble Mr. Justice C. Madhavan Nair (*Barrister-at-Law*).
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The Advocate-General.

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Madras Law Journal Reports.

II] JULY [1937

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the North-West Frontier Province.]

PRESENT:—LORD MAUGHAM, SIR SHADI LAL AND SIR GEORGE RANKIN.

Musammat Vaishno Ditti .. *Appellant**

v.

Musammat Rameshri and others .. *Respondents.*

P.C.
Vaishno Ditti
v.
Rameshri.

Practice and procedure—Proceedings under preliminary decree for taking of accounts—Whether execution proceedings—Sum due to decree-holder found to be in excess of sum on which court-fee paid—Failure to pay balance of court-fee—Dismissal of suit—Jurisdiction—Court-Fees Act (VII of 1870), S. 11.

Under the Civil Procedure Code, 1908, proceedings under a preliminary decree for accounts to obtain a final decree for money are proceedings in the suit and not proceedings in execution in the technical sense of that word as used in the Code.

The plaintiff, having been successful in certain proceedings, was by Order in Council granted a decree entitling her to a fourth share in certain movable and immovable properties, and a decree for rendition of accounts in respect of that share, together with rents, profits, and interest. Accordingly she applied to the Court of the Judicial Commissioner under O. 45, r. 15 (2) of the Civil Procedure Code, 1908, for the carrying into effect of the decrees, that application being intended and treated as an execution application. The plaintiff's share of rents and profits having been duly ascertained, proved to be in excess of the sum on which she had paid the court-fee. On her failure to pay the balance of the fee the Court dismissed her suit with costs, purporting in doing so to act under S. 11 of the Court-Fees Act, 1870.

Held, that, under the Civil Procedure Code, 1908, proceedings under a preliminary decree for accounts to obtain a final decree for money being proceedings in the suit and not proceedings in execution, the proceedings taken by virtue of the Order in Council did not come within the second paragraph of S. 11 of the Court-Fees Act. The words "if the additional fee is not paid . . . . . the suit shall be dismissed" can apply only to cases falling within the second paragraph of the section. Therefore the lower Court

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had no jurisdiction to make the order dismissing the plaintiff's suit, and it must be reversed.

Perianan Chetti v. *Nagappa Mudaliar,* (1906) 16 M.L.J. 543: I.L.R. 30 Mad. 32 and *Ganesh Chandra Mandal* v. *Promotho Nath Ganguli,* (1911) 11 I.C. 73, relied on.

Held, further on the merits that the order of dismissal was improper.

Consolidated appeals, of which the first and only material one was from a decision of the Judicial Commissioner, N.W. Frontier Province, Peshawar, dated 8th April, 1933, dismissing an appeal by the present appellant from a decision of the Acting Senior Subordinate Judge of Peshawar, Kazi Abdul Ghani Khan, dated 27th October, 1932.

The facts are fully stated in the judgment.

L. P. E. Pugh, K.C. and *J. Nissim* for Appellant.—Neither the Acting Subordinate Judge nor the Judicial Commissioner had any jurisdiction to dismiss the appellant's suit after it had been finally granted by a composite preliminary decree. *A fortiori,* they had no jurisdiction to stop the proceedings directed by the Order in Council, and the statutory proceedings consequential upon it. The proceedings pending in the Court of the Senior Subordinate Judge were not a suit for mesne profits, and the second paragraph of S. 11 of the Court-Fees Act, 1870, was not applicable to them either on the facts or on the law. The pending proceedings were statutory proceedings in the suit itself, and both Courts were in error in assuming that they were proceedings in execution of the decree.

In order to give effect to the preliminary decrees granted by the Order in Council of July, 1928, the Courts were under a statutory duty to pass the appropriate final decrees before any question as to payment of additional court-fees could arise for adjudication. In fixing time for payment of the fees, due regard should have been paid to the appellant's right to question the final decrees, as to amount or parties or other matters, within 90 days. It is unjust in the circumstances of this case to exact any additional court-fees before due provision has been made by the respondents for payment into Court or otherwise of monies payable under the final decrees. The Court should settle the amount of the additional court-fees payable, but it is not permissible under the Court-Fees Act, 1870, to fix any time for the payment of such a fee.

L. De Gruyther, K.C. and *J. M. Parikh* for Respondents.—The order dismissing the appellant's suit for failure to pay the additional court-fee due was right. Whether the first paragraph or the second paragraph of S. 11 of the Act of 1870 be properly applicable to the present case, the concluding words of the second paragraph "if the additional fee is not paid . . . . the suit shall be dismissed", are equally applicable to the first. Under whichever

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paragraph, therefore, the present case falls, there was jurisdiction to dismiss the appellant's suit in default of payment of the additional court-fee.

18th March, 1937. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—In this case two appeals have been consolidated. Both arise out of proceedings which followed upon an Order in Council dated 30th July, 1928, made in Appeal No. 84 of 1927. They are brought by Musammat Vaishno Ditti, who on 10th April, 1923, filed her suit in the Court of the District Judge of Peshawar to establish her right to a quarter share in the property left by her maternal grandfather Balmokand and his widow Musammat Kauran. Balmokand had died in 1906 leaving a widow and five daughters of whom one (Ramo) died without issue, so that her share accrued to the others equally. The widow had died in 1909.

The suit having succeeded before the District Judge was dismissed on appeal by the Judicial Commissioner, but by the Order in Council already mentioned the decree of the District Judge was restored "subject to the following modifications:—(*a*) that the appellant be granted a decree for a one-fourth share of the movable and immovable property and (*b*) a decree for rendition of accounts as from the 23rd day of June, 1910, with respect to her share with rents, profits and interest with costs here and in the lower Appellate Court." The family belongs to the community of Arora Sikhs. The original and substantive dispute was between the plaintiff and her mother's three sisters. It turned upon the fact that the plaintiff's mother Nikko (who had died in 1911) had been married in the lifetime of her father Balmokand. For this reason, it was contended, she took no share by inheritance, her sisters being preferential heirs. The matter was complicated by the circumstances that Balmokand's property had devolved upon his widow, that she had made a will and that a compromise decree had been obtained in a previous suit before the District Judge. For the purposes of the first of the two appeals now before the Board it is not necessary to say more than that the three daughters of Balmokand—Rameshri, Ravelo and Lalo—whose interest it was to exclude the plaintiff, were impleaded by her suit.

Upon His Majesty's Order being received in India, it became the duty of the plaintiff to apply to the Court of the

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Judicial Commissioner to enforce it, and the proper order to be made was an order transmitting it to the District Judge to be carried out so far as regards costs and delivery of possession by appropriate steps under O. 21, and so far as regards the account by appropriate steps under O. 20, rr. 16 and 17 of the Civil Procedure Code. The language of rr. 15 and 16 of O. 45 is not well adapted to the case—by no means uncommon—of an Order in Council directing a remand or requiring further proceedings to be taken by the Trial Court as such before arriving at a final determination of the suit. The effect of the Order in Council of 30th July, 1928, so far as regards the direction for accounts was that of a preliminary decree and the same is true of the original decree of the District Judge dated 10th June, 1924. Under the Code of 1908 the proceedings under a preliminary decree for accounts to obtain a final decree for money are proceedings in the suit and are not proceedings in execution in the technical sense of that word as used in the Code.

On 30th July, 1929, the appellant presented to the Court of the Judicial Commissioner an application under O. 45, r. 15 (2). It asked for attachment of certain property, for possession of her one-quarter share, for payment of costs and for the taking of accounts. The application was meant and was treated as an execution application (though it was partly of a different character), and the order of 7th February, 1930, was: "The application is made over to the District Judge, Peshawar, for execution." On 8th October, 1930, the District Judge directed delivery of possession of the immovables to be given under O. 21, r. 35 (2), and took steps to realise the costs by attachment and to ascertain what movable property existed. He also directed that a commissioner should take the accounts and report. On 27th June, 1932, the commissioner reported that the appellant's share of rents, profits, etc., was Rs. 65,243-4-5. Objections having been filed to this report, the Senior Subordinate Judge dealt with them and increased the sum due to the appellant to Rs. 71,493-4-5. This he did by order dated 17th August, 1932, and on the same date he recorded another order: "Arguments heard. Decree-holder is entitled to Rs. 71,493-4-5 *vide* order on file. Decree-holder to put up prayer by 29th and pay balance of court-fee." It appears that the appellant had paid court-fee on Rs. 44,250 only, this being the sum at which she had valued her claim. On 29th August,

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1932, the matter was adjourned to 20th October, and on that date another judicial officer, acting as Senior Subordinate Judge, dismissed the appellant's suit with costs by reason that she had not by that time paid the additional court-fee. He purported to act under the second paragraph of S. 11 of the Court-Fees Act (VII of 1870). A formal decree was drawn up dismissing the suit with costs, and an appeal therefrom to the Judicial Commissioner was dismissed on 8th April, 1933. The appellant obtained from the Judicial Commissioner the usual certificate under S. 110 of the Code and on this the matter comes before the Board as of right.

Their Lordships are not of opinion that the order dismissing the appellant's suit can be maintained. S. 11 of the Court-Fees Act is as follows:—

"In suits for mesne profits, or for immovable property and mesne profits, or for an account, if the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amounts so decreed, shall have been paid to the proper officer.

"Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained, is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed."

Upon this it seems clear that in cases within the first paragraph non-payment of the balance of court-fee merely postpones the date on which the decree can be executed, while the second paragraph is only applicable "where the amount of mesne profits is left to be ascertained in the course of the execution of the decree." Both Courts in India considered that the present case fell within the second paragraph, but the account directed by the Order in Council was not an account of mesne profits nor was it so described. It involved among other things an account of the sums received from a money-lending business. Moreover the amount due to the plaintiff thereon was not "left to be ascertained in the course of the execution of the decree" a phrase which is explained by Ss. 196 and 197 of the Code of 1859 [*cf.* Ss. 47, 211 and 212 of the Code of 1882,

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Ramgulam Sahu v. *Chintaman Singh*[1]]. Accordingly, the second paragraph of S. 11 gave no jurisdiction to dismiss the appellant's suit, and before the Board this was not contested. It was argued, however, that the concluding sentence of the section applied to the cases mentioned in the first paragraph as well as to those governed by the second. This argument is contrary to *Perianan Chetti* v. *Nagappa Mudaliar*[2] and was rejected by Sir Lawrence Jenkins, C.J. and Cox, J., in *Ganesh Chandra Mandal* v. *Promotho Nath Ganguli*[3]. A reference to the Act as printed by the Government printers and published in 1871 confirms this opinion, the sentence appearing as a part of the second paragraph. Their Lordships, agreeing with these decisions, are of the opinion that the learned Subordinate Judge had no jurisdiction to make the order complained of. They are further of opinion that on the merits of the case the order was an improper one. That a suit in which the plaintiff had already established her right to Rs. 71,493 and paid court-fee on Rs. 44,250 should be dismissed for default in payment to the Government of some 300 rupees is a result which may be tolerated as *ultima ratio* if it be the consequence of contumacy or wilful and persistent disregard of the rights of the defendants. But the order in the present case was made in no such circumstances—indeed with a minimum of circumspection and no warning. The order of 17th August, 1932, even if it limited a time of payment (which is not clear), was not a peremptory order, and on the 29th August the adjournment to 20th October was not a second order limiting a time for payment. At no time was there in existence an order fixing the amount and limiting a time for payment; still less was there a peremptory order on the footing that the plaintiff was in default. The statute does not forbid the Court to extend time for payment or require the Court to act unreasonably. Their Lordships are wholly unable to regard the order as a reasonable one, and on this ground also consider that it cannot be allowed to stand.

The second matter raised by this consolidated appeal comes before the Board by special leave granted by Order in Council dated 25th July, 1934. The appellant's purpose in this part of her appeal is to establish that two persons called

1. (1925) I.L.R. 5 Pat. 361 at 385.
2. (1906) 16 M.L.J. 543: I.L.R. 30 Mad. 32.
3. (1911) 11 I.C. 73.

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Manmohan Singh and Sardar Kirpal Singh (sons of one Ganga Singh) are personally liable to her for the sums due as a result of the account directed by the Order in Council dated 30th July, 1928, and for the costs thereby awarded.

It may here be explained that in 1911 Ganga Singh was appointed guardian of the property of Ravelo and Lalo under the Guardian and Wards Act (VIII of 1890). He died in 1916, and on 20th February, 1917, the District Judge appointed his sons Manmohan and Kirpal as joint guardians in his stead. Musammat Lalo having died on 30th July, 1925, leaving two minor sons, Kirpal was on 10th October, 1925, allowed by the District Judge to retire from the office of guardian, leaving Manmohan to act singly. Musammat Ravelo came of age in 1929, and in that year Manmohan's guardianship of Lalo's sons would appear to have been terminated. So far as appears, both Manmohan and Kirpal are in a position to claim that accounts have been rendered by them and passed by the District Judge under the Act of 1890. Both attended before the commissioner on the taking of accounts in the present case.

It is necessary on this part of the case to review the history of the appellant's suit. Her original plaint of 10th April, 1923, claimed a declaration only, and this having been held improper, she filed an amended plaint on 26th November, 1923. By this Manmohan and Kirpal were mentioned only as guardians of the minor defendants Lalo and Ravelo, but on 20th December, 1923, an order was obtained making them defendants and they filed a written statement as such on 24th January, 1924. The plaint claimed that they should account as having been trustees of the property of Balmokand, and this they disputed, saying that they were guardians only and liable to account only as such. Issue No. 4 was framed: "Whether suit for account lies and if so against whom?" The District Judge in his judgment (10th June, 1924) answered this issue as follows: "*Issue No.* 4. . . . All the income was distributed between the defendants and I don't see any reason that the plaintiff should be deprived of bringing her suit against any of them. They are equally responsible and I hold that the plaintiff is entitled to bring a suit for rendition of accounts as against all the defendants." The decree as drawn up and signed by the learned Judge did not mention the names of Manmohan or Kirpal as among the defendants, and the ordering portion was " that the plaintiff is granted a decree for one-fourth

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share of the immovable property and a decree for rendition of accounts with respect to her share." From this decree an appeal was taken to the Court of the Judicial Commissioner by the three daughters of Balmokand in which the plaintiff was the sole respondent. On 26th August, 1925, the Judicial Commissioner's Court allowed the appeal and dismissed the suit with costs. Application for a certificate that the case was fit to be taken on appeal to His Majesty was made by the plaintiff on 15th November, 1925, by a petition headed: "*Mussammat Vaishno Ditti, wife of Surjan Singh* v. *Mussammat Rameshri, wife of Manmohan Singh, and others*", and a certificate was duly given in August, 1926, intituled in like manner. The plaintiff by her case named and asked decree against Manmohan and Kirpal as well as the daughters of Balmokand. The respondents' case was lodged on behalf of the daughters and of Kirpal, but not Manmohan. The judgment of the Board in July, 1928, was in no way directed to the question of the presence, the character, or the liability of either Kirpal or Manmohan, but when the Registrar came to draw up the Order in Council he found that there was a dispute as to the parties to the appeal. To resolve this, as their Lordships would expect, he took the most careful steps. At the joint request of the solicitors on each side he cabled to the Judicial Commissioner for a certificate showing the names of the parties to the appeal at the date of the order admitting the appeal (10th November, 1926). A certificate was in due course received dated 16th November, 1928, stating that the respondents to the appeal were Rameswari, Ravelo and the two minor sons of Lalo—who had died while the appeal was pending before the Judicial Commissioner's Court—the three minors being under the guardianship of Manmohan and Kirpal. This certificate was not given without hearing the parties. The Judicial Commissioner had before him learned counsel for the plaintiff-appellant who admitted that Manmohan and Kirpal were not parties to the Privy Council Appeal in their personal capacity but only as guardians of certain minors. The Order in Council was finally issued accordingly, and no application to vary it was made till 1934 when special leave to bring the present appeal was asked from the Board. On 18th July, 1932, however, it appears that the Subordinate Judge as the Trial Court was asked to amend the decree of the District Judge dated 10th June, 1924, by adding the names of

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Manmohan and Kirpal as defendants liable thereon. This he refused on 27th October, 1932, and on 8th April, 1933, the Judicial Commissioner dismissed the appellant's application in revision to have that order reversed. From this decision special leave to appeal has been given by His Majesty in Council, though no certificate was applied for in India.

Their Lordships are by no means satisfied from the judgment of the District Judge (10th June, 1924) on the fourth issue that he intended to hold Manmohan and Kirpal personally liable to the plaintiff, and it is plain that he signed a formal decree which had no such effect. Indeed it would rather appear that he understood the contention of the defence to be that the major defendant only could be made liable, and that the rejection of this conclusion was all that he had in mind. This may have been a sad misapprehension, but to correct it an appeal was necessary. Neither Manmohan nor Kirpal was made party to the appeal in the Court of the Judicial Commissioner, and no mention of either is to be found in the grounds of appeal or other proceedings to obtain a certificate under S. 110 of the Code. The appellant's solicitors in England and counsel in India acquiesced in the view embodied in the Judicial Commissioner's certificate of 16th November, 1928. Had they been minded to challenge it, it was open to them, and it was their duty, to make formal application to the Board in that behalf and for directions if necessary as to the taking of evidence. In their Lordships' opinion, it is out of the question that they should now permit the personal liability of these two parties to be reagitated—a course which would involve recasting the decree of the District Judge and either rehearing the appeals that ensued thereon or providing for new appeals to be now brought. The condition of the record in this case is certainly lamentable, and there can be no defence of the lax practice whereby the names of parties are not fully and properly entered in important documents such as decrees and orders admitting appeals. But parties have the remedy in their own hands if the Court fails to draw up orders properly, and should apply at once to have them put right. The matter must now rest upon the terms of the Order in Council of 30th July, 1928. In 1937 it is too late to bring under liability persons who had escaped in 1924 and who have not been parties to the subsequent proceedings.

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On this view their Lordships find it unnecessary to discuss any further difficulties of procedure which may confront the appellant in asking the Board to reverse the decision of the Trial Judge refusing to amend the decree of 10th June, 1924. Her case is in no way advanced by the fact that in spite of the terms of the Order in Council she sought to obtain relief thereunder against Manmohan and Kirpal. The respondents in their case complain that the appellant in obtaining special leave failed to disclose important facts, and ask that upon this ground the appeal should be dismissed, but as their Lordships did not call upon the respondents' counsel to argue this branch of the case their complaint has not been established, and their Lordships do not treat the appellant or her advisers as in fault on this account.

Their Lordships regret, however, to find themselves obliged to complain of the case lodged on behalf of the appellant, which enters at length into matters of accounting and contains charges and injurious suggestions against the respondents and against officials of the Courts in India. It is extravagant in length and displays a poor appreciation of what is required by the rules of the Board or likely to be useful for the decision of the appeal. Conciseness is not always attained, but in this instance it is not aimed at, the sense of relevance being impaired by an undue spirit of contention. The paperbook, moreover, contains many documents of no possible utility to the hearing of the appeal. Their Lordships are not satisfied with the explanation given at the bar, and they find it necessary to take account of these matters in deciding upon the order as to the costs of this appeal.

In their Lordships' view this consolidated appeal must be altogether dismissed as against the respondents Manmohan Singh and Sirdar Kirpal Singh. As against the remaining respondents, Musammat Rameshri, Musammat Ravelo and the two sons of Musammat Lalo (deceased), the appeal should be allowed so far as regards the order and decree of 20th October, 1932, dismissing the suit and the order of the Court of the Judicial Commissioner dated 8th April, 1933, in affirmance thereof. These should be set aside and there should be a direction that the Trial Court do proceed to pass a final decree on the basis of the decision of the Subordinate Judge dated 17th August, 1932, upon the objections to the commissioner's report, it being open to any party to object to such decision by

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appeal from the final decree. Save as aforesaid, this consolidated appeal should be dismissed. Their Lordships will humbly advise His Majesty accordingly.

As the appellant has succeeded in setting aside the dismissal of her suit, she would ordinarily have been entitled to some costs of this appeal, but, in view of the costs which her advisers have unnecessarily occasioned to the respondents and of the breach of rules involved, their Lordships will make no order as to these costs. The appellant, however, will get from the respondents, other than Manmohan and Kirpal, her costs of the appeal to the Judicial Commissioner's Court against the Subordinate Judge's order of 20th October, 1932, dismissing her suit. The final decree to be passed by the Trial Court will deal with all questions of costs outstanding in that Court.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *Stanley, Johnson & Allen.*

R.C.C. —— *Appeal partly allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice*, MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE LAKSHMANA RAO.

Parvataneni Lakshmayya .. *Petitioner* (Petitioner)*

v.

The Official Receiver of Krishna at Masulipatam .. *Respondent (Respondent).*

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Lakshmayya v. Official Receiver of Krishna at Masulipatam.

Provincial Insolvency Act (V of 1920), S. 28 (5)—Civil Procedure Code (V of 1908), S. 60 (1) (c)—'Agriculturist'—Test of.

The test of an agriculturist for exempting his property from vesting in the Official Assignee under S. 28 (5) of the Provincial Insolvency Act is not that it is the main source of income, neither is it the 'sole source of income'. Having regard to the scheme of S. 60, Civil Procedure Code, exempting from attachment as it does tools of artisans, and where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed grain as may in the opinion of the Court be necessary to enable him earn his livelihood and houses and other buildings occupied by him, protection is intended to be given to those who are tillers of the land and an agriculturist in the section is a person who is really dependent for his living on tilling the soil and unable to maintain himself otherwise. Main, chief or principal sources of income are not the proper tests. A man's main source of

* C. R. P. No. 1121 of 1934. 16th March, 1937.

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income may be from tilling the soil but his other source or sources of income may be more than sufficient to maintain him. The fact that a man's income from tilling the soil may be larger than his income from his ownership of land or other sources does not make him an agriculturist within the meaning of the section. At the same time there is no reason for depriving an agriculturist of the exemption under the section because he may have invested money in business or businesses as alleged in the present case and may derive some income therefrom or do cooly work to add to his earnings. The test of sole source of income, if applied, would deprive him of the benefit of the section and the proper test is that he must be a tiller of the soil really dependent for his living on tilling the soil and unable to maintain himself otherwise.

Case-law reviewed.

Muthuvenkatarama Reddiar v. *Official Receiver, South Arcot,* (1925) 50 M.L.J. 90: I.L.R. 49 Mad. 227 and *Gopalam Garu* v. *Adusumilly Gopalakrishnayya Garu,* A.I.R. 1927 Mad. 342: 93 I.C. 416, dissented from.

Petition under S. 75 of the Provincial Insolvency Act, praying the High Court to revise the order of the District Court of Krishna at Masulipatam in C. M. A. No. 41 of 1933 preferred against the Order of the Court of the Subordinate Judge of Bezwada (Additional) in I.A. No. 1263 of 1931 in I. P. No. 23 of 1929.

The Civil Revision Petition came up in the first instance before Venkataramana Rao, J., who made the following Order of Reference to a Bench.

The only question in this case is whether the insolvent is an agriculturist within the meaning of S. 60 (1) (*c*) of the Code of Civil Procedure. In *Muthuvenkatarama Reddi* v. *Official Receiver, South Arcot,*[1] a Bench took the view that in order to constitute an agriculturist within the meaning of that section agriculture must be the sole source of living. In *Gopalam Garu* v. *Adusumilly Gopalakrishnayya Garu*[2] another Bench, a member of which was also a party to the other decision, took the view that in order to constitute an agriculturist it is enough if his chief source of income was agriculture. In view of this difference of opinion I think it desirable to have this matter decided by a Bench and I accordingly refer it to a Bench.

[On this reference the case was posted before a Full Bench as constituted above.]

P. Satyanarayana Rao for Petitioner.

V. Govindarajachari for Respondent.

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1. (1925) 50 M.L.J. 90: I.L.R. 49 Mad. 227.
2. A.I.R. 1927 Mad. 342: 93 I.C. 416.

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The judgment of the Court was delivered by

The Chief Justice.—The only question raised in this Civil Revision Petition is whether the insolvent is an "agriculturist" within the meaning of S. 60 (1) (*c*) of the Civil Procedure Code: and this petition has been posted before a Bench of three Judges because in *Muthuvenkatarama Reddi* v. *Official Receiver, South Arcot,*[1] Devadoss and Waller, JJ., took the view that in order to constitute an agriculturist within the meaning of that section agriculture must be the sole source of living whereas in *Gopalam Garu* v. *Adusumilly Gopalakrishnayya Garu,*[2] Devadoss and Wallace, JJ., held that in order to constitute an agriculturist it is enough if his chief source of income is agriculture. These decisions are obviously in conflict.

In the present case, the facts are that the petitioner's income was derived from agriculture, as a mahazadar enjoying kists paid by his ryots, from a motor business and a tobacco trade. He became insolvent and it was claimed that his house was not liable to sale because of S. 60 (1) (*c*) of the Code of Civil Procedure. The Subordinate Judge held that the petitioner was not an agriculturist within the meaning of that section and the District Judge affirmed that decision on appeal.

By reason of S. 60 (1) (*c*) of the Code of Civil Procedure "houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him" shall not be liable to attachment or sale; and by reason of S. 28 (5) of the Provincial Insolvency Act the property of the insolvent which vests in the Official Assignee is not to include property which is exempted by the Code of Civil Procedure from liability to attachment and sale in execution of a decree.

We will, first of all, take the cases cited which support the view that in order to constitute an "agriculturist" within the meaning of S. 60 (1) (*c*), Civil Procedure Code, it is enough if his chief source of income is agriculture. *Ma E Se* v. *Ma Bok Son*[3] was the first case cited on the petitioner's behalf; but it does not really assist his argument because there both a house in a village and also a hut in a field belonging to an agricul-

1. (1925) 50 M.L.J. 90: I.L.R. 49 Mad. 227.
2. A.I.R. 1927 Mad. 342: 93 I.C. 416.
3. (1929) I.L.R. 7 Rang. 766.

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turist and occupied by him were held to be exempt from attachment. It was assumed that the occupier was an agriculturist and it was held that the house although situated in a village and not in the field was with the hut equally exempt from attachment under the provisions of S. 60 (1) (*c*). That case therefore does not decide the point here. *The Bank of Chettinad* v. *Ko San Ok*[1] next cited was upon the point of whether houses belonging to and occupied by an agriculturist otherwise than in connection with his calling are exempt from attachment under that section and does not decide the point before us. In that case *Muthuvenkatarama Reddi* v. *Official Receiver, South Arcot*[2], was cited but only upon the point under discussion by the Full Bench and not on the present one. Next, reference was made to some decisions of Allahabad High Court and all of them are upon this point. In *Jamna Prasad Raut* v. *Raghunath Prasad*[3], the appellant was both a zamindar and a cultivator of land and the question was whether he was an agriculturist and on p. 308 the test applied was 'what is his main source of income and whether or not he is an agriculturist within the strict sense of the term and occupies the house as such' and it was stated that he had to show that his main source of income was cultivation and not zamindari and that he was in the strict sense of the term an agriculturist. This it was held that he had failed to do. In *Shafian* v. *Hamid-ul-lah Khan*[4] the test applied was whether his chief occupation and chief means of livelihood were agriculture. It appears that the judgment-debtor there, was both an agriculturist and a zamindar, his zamindari being infinitesimal in amount and he was held to be an agriculturist. In *Sabha Ram* v. *Kishan Singh*[5] a Division Bench applied the test of whether the main source of income was agriculture. The same test was employed in *Bachan Singh* v. *Bhika Singh*[6], *i.e.*, main source of income. As in the other Allahabad cases the party alleging himself to be an agriculturist was also a zamindar and a proposition of law was propounded by the lower appellate Court that a pure and simple zamindar is to be taken as an agriculturist in the absence of any legal definition to the contrary. On second appeal Iqbal Ahmad, J., however,

1. (1933) I.L.R. 11 Rang. 372 (F.B.).
2. (1925) 50 M.L J. 90: I.L.R. 49 Mad. 227.
3. (1913) I.L.R. 35 All. 307.
4. (1916) 33 I.C. 727: 14 A.L.J. 240.
5. (1930) I.L.R. 52 All. 1027.
6. A.I.R. 1927 All. 601.

expressed the opinion that the presumption is the other way and a zamindar must be taken to be a zamindar unless his main source of income is proved to be from cultivation. In *Dharam Singh* v. *Shah Mal Singh*[1] also a case of a zamindar obtaining his livelihood from cultivation as well as from the zamindari the main source of income test appears to have been accepted by Niamatullah, J., though he says the fact that he cultivates his own land and thereby maintains himself and his family will not necessarily make him any the less an agriculturist and that on the other hand, if land which he cultivates and has let to tenants is considered to be sufficient for his maintenance, he will not be considered to be an agriculturist only because he cultivates the whole of what he owns. He then discusses the facts of the case and states that 'the fact that the appellants own 27 pakka bighas of land is in my opinion an indication of the extent to which they are maintained by sources other than agriculture pure and simple. This amount of land if let to tenants will fetch sufficient though somewhat reduced income for the maintenance of the appellants. On the whole I think that they cannot be considered to be agriculturists within the meaning of S. 60 (1) (*c*). Next, two decisions of the Lahore High Court were cited, namely, *Abdullah* v. *Anjuman Dehi*[2] and *Gurbakhsh Singh* v. *Lal Chand-Dharsan Lal.*[3] In the former case, it was held by 'agriculturist' is meant one who earns his livelihood wholly or principally by agriculture or ordinarily engages personally in agricultural labour. In that latter case it was held that an agriculturist means a professed cultivator and a farmer or husbandman. In that case the judgment-debtor did not himself till the land and earn his living thereby wholly or partly and he was held not to be an agriculturist. But on page 739 Coldstream, J., makes some observations which, with respect, we cannot agree with. He there expresses the opinion that there is no justification in the wording of the section for holding that for the purpose of that section the term excludes a large landowner or a person who does not depend solely or mainly on cultivation for his livelihood. In our opinion such a person would not be an agriculturist in the strictest sense in which the section should be applied. We are supported in this view by *Jivan Bhaga* v. *Hira Bhaiji.*[4] There

1. A.I.R. 1931 All. 20.
2. A.I.R. 1928 Lah. 132.
3. A.I.R. 1936 Lah. 737.
4. (8871) I.L.R. 12 Bom. 363.

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West, J., says that 'it was for agriculturists in the strictest sense and for an agriculturist in that sole character that the protection of S. 266 (*c*) of the Civil Procedure Code the equivalent of the present S. 60 (1) (*c*) was intended.

On the other side, there is the decision of the Calcutta High Court in *Surangini Deby* v. *Kedarnath Chandra*[1] where the same view as that taken in *Muthuvenkatarama Reddi* v. *Official Receiver, South Arcot*[2], was expressed. There it was held that where a judgment-debtor's only source of living is not by cultivation of land he is not an agriculturist within the meaning of S. 60 (1) (*c*).

After a consideration of the authorities referred to, we have come to the conclusion that the test is not 'main source of income' neither is it 'sole source of income.' We think that having regard to the scheme of the section exempting from attachment as it does tools of artisans, and where the judgment-debtor is an agriculturist his implements of husbandry, and such cattle and seed-grain as may in the opinion of the Court be necessary to enable him to earn his livelihood, and his houses and other buildings occupied by him, protection is intended to be given to those who are real tillers of the land and that an agriculturist in the section is a person who is really dependent for his living on tilling the soil and unable to maintain himself otherwise. Main, chief, or principal sources of income are not, in our view, the proper tests. A man's main source of income may be from tilling the soil but his other source or sources of income may be more than sufficient to maintain him. The fact that a man's income from tilling the soil may be larger than his income from his ownership of land or other sources does not seem to us to make him an agriculturist within the meaning of the section. At the same time we see no reason for depriving an agriculturist of the exemption under the section because he may have invested money in a business or businesses as alleged in the present case and may derive some income therefrom or do coolie work and add to his earnings in bad times. The test of sole source of income if applied would deprive him of the benefit of the section and we prefer the test which we have already laid down, *viz.*, that he

1. (1921) 63 I.C. 681.

2. (1925) 50 M.L.J. 90: I.L.R. 49 Mad. 227.

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must be a tiller of the soil really dependent for his living on tilling the soil and unable to maintain himself otherwise.

The case is accordingly sent back to the lower Court for disposal in the light of our observations: the costs of this petitioner will abide the result there.

K.C. —— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE MOCKETT.

Marudakonar (deceased) and another .. *Appellants** (*Plaintiff and Nil*)

v.

Veerammal and others .. *Respondents* (*Defendants 1 to 4 and 6*).

Marudakonar *v.* Veerammal.

Chit fund—Rules of—Successful bidder executing mortgage bond securing future instalments—Sons of the subscriber supplying their property as security and executing the mortgage bond—Closing of the Chit fund—Subscriber asked to pay the amount to be refunded to the assignee of the mortgage bond from the manager—The running by the Chit fund of its normal course, whether an implied condition—Whether the sons of the subscriber could be bound by the Chit fund rules—Whether relief asked for by the plaintiff was proper.

The rules of a Kuri Chit fund provided that the successful bidder at an auction should receive his bid amount only after executing a bond securing the payment of future instalments. In accordance with it the defendant, a successful bidder, not having properties of her own, executed a security bond offering as security properties of her sons who though not parties to the Chit transaction joined in the security bond. The Chit continued for two more years but had to be closed owing to the inability of the subscribers to pay subscriptions.

It was alleged by the plaintiff herein that the subscribers met and entered into an agreement providing that the Chit might be stopped and that non-benefited subscribers might be returned the amounts so far subscribed by them and that the benefited or prize winning subscribers should refund with interest the amount drawn by them subject to their right to take back the amounts actually subscribed by them with a certain rate of interest. On this basis a certain figure was arrived at as representing the amount to be paid by the defendant who was a prize winner. The plaintiff, who was an assignee from the manager of the Kuri of the mortgage bond executed by the defendant, claimed relief as per the arrangement arrived at the meeting of subscribers. The defendant contended that the arrangement was not true.

Held, (1) that it would be reasonable to hold that in cases like the present the security bond should be interpreted in the light of the rules, and the obligation undertaken by it was not repayment of the benefit already received as if it were a debt, but the payment of future subscriptions. Whether the continuance of the Chit was a condition precedent or not would not depend merely on the terms of the bond but should be decided with reference to the

* Appeal No. 493 of 1930. 11th August, 1936.

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surrounding circumstances including the rules of the Chit. For the purpose, a distinction might have to be drawn between cases in which benefited subscribers ceased to have any share in the profits arising out of future drawings and cases in which they continued to share in such profits. The present case belonged to the latter category.

(2) That reading the assignment deed it was clear that the intention was to transfer the first defendant's supposed liability under the alleged arrangement and the fact that the assignor thought the mortgage bond would be available to secure even the amount due under that arrangement, would hardly justify the Court in reading into the assignment deed an intention to assign the mortgage independently of the truth or otherwise of the alleged arrangement. If the security given under the mortgage bond was to be regarded only as a part of the Chit fund scheme it would be scarcely fair to allow the manager to treat the bond as an independent transaction by itself and assign it over to a third party who would be having nothing to do with the conduct of the Chit fund affairs. The subscriber whose mortgage bond was transferred would be deprived of the opportunity of pleading as against the assignee claims that he might have against the assignor according to the ruling in *Subramania Aiyar* v. *Subramania Pattar*, (1916) 30 M.L.J. 615: I.L.R. 40 Mad. 683. To hold so would in a large measure frustrate the purpose of the provisions of the assignment of the Chit fund affairs by the manager without the consent of the members.

(3) That the mortgage bond had been executed not only by the subscriber but by her sons in respect of property belonging to them. Because they were not parties to the Chit fund arrangement, it could not therefore be said that any liability that would fasten itself on general principles would necessarily fasten itself to them as well. A reasonable interpretation of the mortgage bond as against them could only be that it was intended to secure the first defendant's obligation on the assumption that the fund would run its normal course instead of a collapse in the middle. In these circumstances it would be improper to allow the plaintiff to ask the Court to give relief on a basis wholly different from the one on which the plaint was framed.

Appeal against the decree of the Court of the Subordinate Judge (Second Additional) of Coimbatore in O. S. No. 3 of 1929.

A. C. Sampath Aiyangar for Appellants.

T. M. Krishnaswamy Aiyar and *M. Krishna Barathy* for Respondents.

The Court delivered the following

Varada-chariar, J.

JUDGMENTS. *Varadachariar, J.*—This is an appeal by the plaintiff who, as assignee of the rights of one Rangaswami Naidu under the suit mortgage bond Ex. A, sued to recover from the defendants and from the mortgaged properties a sum of Rs. 8,000.

The plaint followed the lines suggested by the assignment deed, as to the nature of the plaintiff's claim. Rangaswami Naidu had been conducting a kuri chit with 18 members and it was expected that the chit will run for 18 years. The first defendant Veerammal was one of the subscribers to that chit

and was holding $1\frac{1}{2}$ tickets in respect of which Rs. 750 was payable per annum at the rate of Rs. 500 per chit. In the first auction held on 11th November, 1921, the first defendant became the successful bidder. As per the rules of the kuri chit she was willing to bid at a discount of more than Rs. 5,600 per ticket, with the result that out of the Rs. 9,000 which constituted the collection for the first year she received only Rs. 3,374 per ticket or Rs. 5,061 for the $1\frac{1}{2}$ chits. The balance which was given up by way of discount was of course distributed amongst all the subscribers as profits of the chit. The chit-fund rules provide that a successful bidder at an auction should receive his bid amount only after executing a bond securing the payment of future instalments. The first defendant had apparently no property of her own, at any rate that is the basis on which Ex. A proceeds. The other defendants are her sons and as they had the benefit of the amount which she received as the result of her bid they agreed that their properties might be given as security for the purpose of enabling Veerammal to draw the bid amount. Hence Ex. A was executed by Veerammal and five of her sons, the two youngest being minors represented by herself as guardian.

It is common ground that the chit continued to be conducted only for two more years. The auction that was to take place in November, 1924, did not take place, because it is alleged, a number of subscribers expressed themselves unable to pay their subscriptions. It is also said that they suggested that the chit may be closed. It is accordingly recited in Ex. B and it has also been attempted to be proved as part of the plaintiff's case, that all the subscribers met on the 9th of January, 1925, and entered into an arrangement providing that the chit might be stopped and that the non-benefited subscribers might be refunded the amounts so far subscribed by them and that the benefited or prize winning subscribers should refund with interest the amounts drawn by them subject to their right to take back the amount actually subscribed by them with a certain rate of interest. On this basis, it was worked out in Ex. B that up to the 9th of February, 1925, Veerammal was liable to pay to Rangaswami Naidu the chit-Conductor a sum of Rs. 4,177-2-0. The amount was calculated up to the 9th February, because it is the plaintiff's case that on the 9th January, it was resolved that all parties should be given one month's time to carry out the arrangement then arrived at.

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Varada-chariar, J.

After setting out the details above referred to and the process by which the amount to be paid was arrived at, Ex. B goes on to state:

"Although I made demands for the payment of this sum of Rs. 4,177-2-0 and interest from the said date according to the resolutions passed in the meeting and according to the terms of the deed, the same was not paid. The amount of interest due on Rs. 4,177-2-0 as per terms, is Rs. 407-13-0. Total amount of principal and interest in Rs. 4,584-15-0. For this sum of Rs. 4,584-15-0 I have assigned to you this day the said mortgage-deed in respect of chit fund . . . . the said mortgage-deed has been assigned to you. So you shall yourself recover with interest due as per terms of the said deed, Rs. 4,177-2-0 being the amount of principal and interest thereon till this date and subsequent interest thereon according to the terms of the deed . . . . In future myself or my heirs shall have no right or claim whatever in respect of the said mortgage-deed".

I have set out the provisions of Ex. B, because one of the questions raised in the course of the argument related to the nature of the rights assigned to the plaintiff. After referring to the facts above set out, the plaint claims relief on the basis that as per the arrangement of 9th January, 1925, the sum of Rs. 4,177-2-0 was due to the plaintiff as assignee and that interest was payable thereon as per the terms of Ex. A, including its provisions relating to penal interest on default. The defendants contended that the story as to the meeting alleged to have taken place on 9th January, 1925, and the arrangement said to have been come to on that day was not true and that in any event the first defendant was not a party to any such arrangement.

It will be convenient to dispose of the issue relating to the alleged arrangement of 9th January, 1925, at the outset. Rangaswami Naidu was not examined as a witness in the case nor was any written evidence produced purporting to record what is said to have taken place on 9th January, 1925, though witness after witness on the plaintiff's side stated that the arrangement of that day was embodied in a resolution signed by the persons present. I am not by any means satisfied with the explanation given on the plaintiff's side for the non-production of the written record of that arrangement. The learned Subordinate Judge held that the oral evidence relating to the alleged meeting of the 9th January, 1925, was wholly unsatisfactory and refused to believe it. It cannot be denied that the witnesses examined by the plaintiff have given very vague evidence on the point and are not even able to agree as to whether there was any notice convening such a meeting or

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whether any resolution at such a meeting was then reduced to writing as to the place where and the date on which the alleged meeting took place and as to whether the first defendant Veerammal was present at that meeting and if so what part she took. In these circumstances, no reason has been shown for disturbing the conclusion of the learned Subordinate Judge that the alleged arrangement of 9th January, 1925, has not been proved and much less that the first defendant was a party to any such arrangement. On this finding the case as put forward in the plaint must fail.

In the argument before this Court, the learned Counsel for the appellant has invited us to deal with the case on a different footing. He has argued that on the defendant's case that no arrangement of the kind alleged by the plaintiff took place on 9th January, 1925, the defendants' liability under Ex. A would continue to subsist and that the plaintiff is entitled to a decree at least on that basis, even though the plaint has not been framed on those lines. There can be very little doubt that the basis of the relief thus suggested is very different from the basis on which relief was claimed in the plaint; and it is doubtful if an amendment on these lines could have been permitted at all, even if applied for at an early stage. Putting aside that objection, I should perhaps have tried to help the plaintiff if I had felt the way clear to uphold the contentions advanced by Mr. Sampath Aiyangar on his behalf but having had the benefit of a full argument both from him and from the learned counsel for the respondents as to the construction of Exs. A and B, I am not by any means satisfied that Mr. Sampath Aiyangar's claim that in the events that have happened the plaintiff is entitled to relief on the basis of Ex. A is beyond doubt. It being admitted that from and after 1924 the chit had collapsed, Mr. Sampath Aiyangar argued that whatever rights a subscriber might have as against the chit manager as on a breach of contract, that circumstance would not absolve a benefited subscriber, that is, one who had already drawn his prize from continuing to pay his future subscriptions. He contended that the terms of Ex. A are absolute and not conditional upon the continuance of the chit and he maintained that even if an obligation should be assumed to have been cast upon the chit manager to continue the chit for the full term, the non-fulfilment of that obligation must be held to be independent of the liability of

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the benefited subscriber to pay the future instalments and that the continuance of the chit is not a condition precedent to the enforcement of the liability of the benefited subscriber. On the other hand, Mr. Krishnaswami Aiyar maintained that a security bond like Ex. A must be construed only in the light of the chit rules and not as if there was an independent *debt* payable by instalments, that according to the true construction of the chit rules, subscriptions have to be paid on the date when the chit is to be drawn and that if the chits are no longer to be drawn, because the chit has collapsed, the obligation to pay the subscriptions as per the terms of the rules also comes to an end, whatever other liability might exist under the general law on the part of the benefited subscriber. It seems to me only reasonable to hold that in cases like the present the security bond must be interpreted in the light of the rules and the obligation undertaken by it is not repayment of the benefit already received—as if it were a debt—but the payment of future subscriptions—whether the continuance of the chit was a condition precedent or not, will not depend merely on the terms of the bond but must be decided with reference to the surrounding circumstances, including the rules of the chit fund. For this purpose, a distinction may well have to be drawn between cases in which benefited subscribers cease to have any share in the profits arising out of future drawings and cases in which they continue to share in such profits. The present case belongs to the latter category.

Turning next to the terms of the assignment bond, there are even greater difficulties in the plaintiff's way. Reading it as a whole, it is clear that the intention was to transfer the first defendant's supposed liability under the alleged arrangement of 9th January, 1925 and the fact that the assignor thought that the mortgage bond will be available to secure even the amount due under that arrangement, will not justify the Court in reading into the assignment deed an intention to assign the mortgage independently of the truth or otherwise of the alleged arrangement of 1925. A further difficulty arises from the provision into the chit fund rules that the conduct of the chit fund affairs cannot be assigned by the manager except with the consent of all the subscribers. If as I have already stated the security given under Ex. A is to be regarded only as a part of the chit fund scheme it will be scarcely fair

to allow the manager to treat Ex. A as an independent transaction by itself and assign it over to a third party who will have nothing to do with the conduct of the chit fund affairs. According to the ruling in *Subramania Aiyar* v. *Subramania Pattar*[1] the subscriber whose mortgage bond is thus transferred will be deprived of the opportunity of pleading as against the assignee, claims he may have as against the assignor. So to hold, in a case like the present, may in a large measure frustrate the purpose of the provision against assignment of the chit fund affairs by the manager without the consent of the members.

There is again the fact that the mortgage bond in this case has been executed not by the subscriber Veerammal but by her sons, in respect of property belonging to them. The sons themselves are not parties to the chit fund arrangement; it cannot therefore be said that any liability that will fasten itself on general principles upon a benefited subscriber on the collapse of the chit fund will necessarily fasten itself to them as well. A reasonable interpretation of the mortgage bond, as against them, can only be that it was intended to secure the first defendant's obligation on the assumption that the chit fund would run its normal course. In these circumstances, I do not feel that it will be proper to allow the appellant at this stage to ask the Court to give him relief on a basis wholly different from the one on which the plaint was framed. The appeal accordingly fails and is dismissed with costs.

Mockett, J.

Mockett, J.—I agree. With regard to the question of amendment I would only add this; as framed on the alleged resolution a suit must fail; as my learned brother pointed out it must be based solely on Ex. A. The appellant therefore is bound, as the learned counsel says, to ask for a decree for the amounts due in instalments. There is a complete answer to any application for amendment, *i.e.*, Ex. II. The appellant has never at any time suggested that the first defendant was not willing to pay the instalments. Ex. II which is a letter to the assignee sent on her behalf clearly indicates that she in fact asked him to receive the instalments and expressed her willingness to pay them if the chit fund is to be continued. Under the circumstances I do not think that it would be in any way

1. (1916) 30 M.L.J. 615: I.L.R. 40 Mad. 683.

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possible to allow an amendment which is not only changing the cause of action but is also not supported by the record.

For the reasons given by my learned brother I agree that the appeal should be dismissed with costs.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Kuppuswami Aiyar and others .. *Appellants* (Plaintiffs 1, 2 and 4)*

v.

Sabapathy Pathan and others .. *Respondents (Defendants 1 to 8 and Nil).*

Kuppuswami Aiyar v. Sabapathy Pathan.

Limitation Act (IX of 1908), S. 19—Mortgage of property purchased by vendees to vendors for balance of purchase money—Later mortgage of the same property by the vendees in favour of another—Directions contained in the later deed to pay off previous mortgage—Notice of demand by vendors for the balance of amount—Letter in reply mentioning the directions to the later mortgagee and referring to the latter for payment and disowning liability for Court costs or charges—Whether reply an acknowledgment—Limitation—Whether claim barred.

In a suit for sale on a mortgage executed on 16th October, 1911, filed on 23rd March, 1928, the plaintiff relied upon a reply notice dated 3rd October, 1916, sent by the mortgagors in answer to a demand for payment made by the mortgagee, as saving limitation. The notice stated that the mortgagors had usufructuarily mortgaged the lands to a third person and had therein directed him to pay the suit mortgage amount and therefore it was very wrong on the part of the mortgagee to make a demand upon them for the payment of the mortgage amount without receiving the same from the above-mentioned usufructuary mortgagee and that they would not be liable for any costs or damages since they had so directed payment.

Held, that the letter in reply to the demand was sufficient acknowledgment within the meaning of S. 19 of the Limitation Act as there was nothing therein amounting to a repudiation of liability or to a statement that the mortgagors would never discharge the debt. There was an admission of a present debt but coupled with a refusal to pay.

Explanation 1 to S. 19, relied on.

Shriniwas v. *Narhar,* (1908) I.L.R. 32 Bom. 296, followed.

Kandaswami Reddi v. *Suppammal,* (1921) 42 M.L.J. 268: I.L.R. 45 Mad. 443 and *Venkata* v. *Parthasaradhi,* (1892) 3 M.L.J. 36: I.L.R. 16 Mad. 220 distinguished.

Chhaterdhari Mahto v. *Nasib Singh,* (1923) 78 I.C. 919: A.I.R. 1924 Pat. 806, dissented from.

It is well settled under the Indian law that in order to constitute acknowledgment there need neither be an express nor an implied promise to pay, whatever may be the English law on the point.

Under S. 19 of the Limitation Act the words relied on in order to constitute a valid acknowledgment must be such as to show an existing jural relationship of debtor and creditor.

* S. A. No. 1893 of 1931. 1st April, 1936.

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Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in A. S. No. 32 of 1931 (A. S. No. 48 of 1930) District Court, West Tanjore at Tanjore, preferred against the decree of the Court of the District Munsif of Tiruvadi in O. S. No. 180 of 1929 (O. S. No. 123 of 1928, D. M. C., Kumbakonam).

S. Panchapakesa Sastri and *K. R. Krishnaswami Aiyar* for Appellants.

B. Sitarama Rao and *K. Narasimha Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal raises a question of limitation. The main facts are not in dispute. Plaintiffs 1 to 3 and the father of the second plaintiff sold the suit property to one Chidambara Pathan and his brother Vaithyalinga Pathan, by a sale-deed dated the 16th October, 1911, and as on the said date the second plaintiff was a minor, a sum of Rs. 800 was retained with the vendees to be paid either on the second plaintiff attaining majority or on the vendors giving security. On the said date a mortgage-deed was executed by both Vaithyalinga Pathan and Chidambara Pathan in favour of the first plaintiff and the father of the second plaintiff for Rs. 800 securing that amount. The recital as regards payment under the said mortgage is to this effect:

" We will pay you the said sum of Rs. 800 without any objection together with interest at 11 as. per cent. per mensem at any time whenever you demand us to pay after giving security for the sum".

On the 19th December, 1915, the vendees appear to have usufructuarily mortgaged the said property to one Kandaswami Pillai by a deed in and by which it was stipulated that the usufructuary mortgagee should pay the said sum of Rs. 800 secured by the mortgage as aforesaid in accordance with the directions contained therein. In August, 1916, a demand appears to have been made by the mortgagees to pay the amount due under the mortgage dated the 16th October, 1911. In answer thereto Vaithyalinga Pathan and Chidambara Pathan gave a reply dated the 3rd October, 1916, to the effect that they had arranged for the payment of the mortgage amount with the usufructuary mortgagee under the mortgage-deed dated the 19th December, 1915. This suit was filed on the 31st March, 1928, to enforce the mortgage dated the 16th October, 1911.

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In the plaint the reply notice dated the 3rd October, 1916, which is marked as Ex. C in the case is relied on for the purpose of saving limitation. Ex. C is in the following terms:

"On 19th December, 1915, we have usufructuarily mortgaged our lands to one Darasuram Kandaswami Nayanakkar, and we have therein directed that after giving security to him for minor's share you should receive the amount of principal and interest due in respect of the mortgage executed in favour of both of you. It is a mistake that you have given me this notice on Nala year Ani 9th without receiving the said amount from him. Since we have directed on 19th December, 1915, in the abovesaid manner, please take notice that we will not be liable for any Court costs or damages as claimed by you in your notice".

Both the lower Courts came to the conclusion that there was no acknowledgment of liability in Ex. C and that therefore the suit was barred. It is contended before me in second appeal that that view is wrong. I think the contention must prevail. Under S. 19 of the Limitation Act the words relied on, in order to constitute a valid acknowledgment, must be such as to show an existing jural relationship of debtor and creditor. From Ex. C it is clear that there is an admission of a debt due and payable under the mortgage which would *prima facie* import an acknowledgment of liability. It is not denied that there is an admission of liability, but what is contended is, that the concluding portion of the letter makes it clear that the mortgagors repudiated their liability. I am unable to agree with this view. There is nothing in the document which amounts to a repudiation of liability or to a statement that the mortgagors would never discharge the debt. Reading the document as a whole, what the mortgagors say is this:

"No doubt there is an amount due and payable under the mortgage; but we have arranged for payment with Kandaswami Pillai and it is your (mortgagees') primary duty to apply to that Kandaswami Pillai for payment and if without recourse to him you file a suit, we would not be liable either for costs or any loss incurred by an unnecessary action".

There is therefore an admission of a present debt but coupled with a refusal to pay because they have arranged for payment elsewhere. Under S. 19 of the Limitation Act, Explanation 1, an acknowledgment may be sufficient though accompanied by a refusal to pay. In my opinion this case is covered by the decision of the Bombay High Court in *Shrinivas* v. *Narhar*[1]. In that case a decree provided for the payment of the amount decreed in instalments. The question arose

1. (1908) I.L.R. 32 Bom. 296.

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whether the second instalment payable under the said decree was barred by limitation. A statement made by the judgment-debtor in answer to an execution application was relied on, and it was to this effect:

"I have asked plaintiff by a written notice to take away the sum of Rs. 300 relating to the second instalment from a third party with whom I have deposited that sum. Therefore I am not responsible to pay the said amount".

This was held to be sufficient acknowledgment within the meaning of the Limitation Act for saving the bar of limitation. Chandavarkar, J., observed thus:

"This in effect means 'I am liable to pay the second instalment; but I have deposited the amount of that instalment with a third person and let the plaintiff take it from him. But so far as I am concerned I refuse to pay'. In other words, there is an acknowledgment of the liability coupled, however, with a refusal to pay on the ground that the amount is deposited with a third party. We think that is the natural construction of the words. We must therefore hold that the second instalment is not barred".

I am inclined to take a similar view of the document in question. I would therefore follow the above decision and hold that Ex. C is sufficient acknowledgment within the meaning of S. 19 of the Limitation Act and that the suit is not barred.

I shall now deal with the cases relied on by Mr. Sitarama Rao for the respondent. The first case on which he places very strong reliance is the case reported in *Chhaterdhari Mahto v. Nasib Singh*[1]. In that case in answer to a suit on a mortgage the statement made by the mortgagors in a written statement in a suit was relied on. That statement was to the effect that in order to pay off the mortgage debt they sold half of the mortgaged property and from the said date the vendees have been in possession thereof. This was held not to be a sufficient acknowledgment. The learned Judges drew this inference on a construction of the document as a whole, but I am not inclined to agree with the reasoning on which their decision is based. Their Lordships, observe, that there is an acknowledgment of the debt, but then they proceed to consider whether it is a sufficient acknowledgment of liability and state:

"On the other hand, the statement that there was a debt due but it has been discharged is not sufficient. The present case seems to stand somewhere between these two .... There is no express statement that it was discharged, but there is a statement that that in order to pay it off a sale was effected on the 13th July, 1903, and since that date the vendees have been in possession

1. (1923) 78 I.C. 919: A.I.R. 1924 Pat. 806.

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of the property. The inference to be drawn from this will at least negative the implication of a promise to pay ".

It is well settled that under the Indian law in order to constitute an acknowledgment there need neither be an express nor an implied promise to pay, whatever may be the English law on the point. I dissent from the view of the learned Judges that in order to constitute an acknowledgment there must be an implied promise to pay. The next case relied on by Mr. Sitarama Rao is the case in *Kandaswami Reddi* v. *Suppammal*[1]. What that case decided was that from a mere admission of a past liability it cannot be inferred that there is a subsisting debt and the learned Judges declined to follow the ruling of Miller, J., in *Ranganayakalu Aiya* v. *Subbayan*[2] to the effect that an admission of past liability unaccompanied by an allegation of discharge should in all cases be interpreted as an admission of subsisting liability. The learned Judges cite with approval the case in *Andiappa Chetty* v. *Alagasinga Naidu*[3] and observe that 'each case must be treated on its own merits and that from the language used and the circumstances in which the acknowledgment is made it must be decided whether it amounts to an implied acknowledgment of subsisting liability'. In this case, as I have pointed out, there is no question of there being an acknowledgment of subsisting liability, though it was accompanied by a refusal to pay. The case in *Venkata* v. *Parthasaradhi*[4] is also distinguishable. In that case the statement in a deposition where the deponent had admitted the execution of a certain bond, but stated that that bond was superseded, was held not to be a sufficient acknowledgment, on the ground that there was no acknowledgment of a subsisting right. There are on the other hand cases to show that where a debtor states that for the debt due a different security was given, that statement was held to operate as a good acknowledgment. In *Pandit Saligram* v. *Radhay Shiam*[5] a renewed promissory note was found to be inadmissible in evidence on the ground that it was unstamped. The plaintiff in that case wanted to rely upon an earlier promissory note which on the date of suit would admittedly be barred by limi-

1. (1921) 42 M.L.J. 268: I.L.R. 45 Mad. 443.
2. (1908) 5 M.L.T. 71.
3. (1911) 21 M.L.J. 1024: I.L.R. 36 Mad. 68.
4. (1892) 3 M.L.J. 36: I.L.R. 16 Mad. 220.
5. A.I.R. 1931 All. 560.

tation but for an endorsement on the back thereof which was to the following effect:

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"On the 7th November, 1925, in lieu of the present promissory note, a second promissory note of the amount of Rs. 1,350 has been executed and this promissory note has become void".

This endorsement was held to be a sufficient acknowledgment of the note in spite of the fact that it was stated in the endorsement that the promissory note had become void. The ground on which it was held to be so is, because the allegation is not that the liability had terminated but that a different form of security for the subsisting liability had been created. Similarly, as I have pointed out, it was never intended to repudiate the liability. Ex. C indicates that a method of payment had been provided which it was the duty of the creditors to resort to before seeking to enforce their remedy against the debtors.

I am therefore of opinion that Ex. C operates as a sufficient acknowledgment of the mortgage in question and that the suit is not barred by limitation. In the result, I reverse the decrees of the lower Courts and pass a preliminary decree for sale. Interest shall be allowed on Rs. 772 at six per cent. from date of plaint up-to-date fixed for redemption and thereafter at six per cent. on the aggregate amount. Time four months. I direct each party to bear their own costs in the second appeal. I direct the first Court costs to be included in the mortgage decree. I direct the Lower Appellate Court's cost to be paid by defendants 3 to 6 and not to be added in the mortgage decree.

Leave refused.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice.*

Marreddi Seshireddi .. *Petitioner* (Plaintiff)*

v.

The Official Receiver, Guntur and another .. *Respondents (Defendants).*

Marreddi Seshireddi *v.* Official Receiver, Guntur.

Provincial Insolvency Act (V of 1920)—Partition suit—Insolvency of defendant pending suit but before decree—Decree for costs against two defendants—If claim for costs a debt provable in insolvency—Payment of costs by the insolvent defendant—Suit for contribution against the other—Leave of Court if necessary under S. 28.

* C. R. P. No. 1596 of 1935. 25th January, 1937.

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If a plaintiff starts a suit against another person and that person becomes an insolvent during the pendency of the suit and subsequent to the adjudication a decree is obtained, the plaintiff can prove in the insolvency both as regards the amount obtained under the decree and the costs awarded, costs being added to the decretal amount, if the debt in respect of which the costs are an incident is one provable in insolvency but not otherwise.

Where therefore pending a partition suit by *A* against *B*, *C* and others, *C* is adjudicated an insolvent and after adjudication a decree is passed for partition and for costs against *B* and *C* jointly and severally, the decree for costs is not a debt provable in insolvency as there was no obligation on *C* to pay the costs of the suit until the decree had been passed. A claim for contribution against *C* by *B* by reason of his having been obliged to pay the costs stands on a stronger position inasmuch as the liability arises in such a case only after payment and not before; and as such leave of the Court under S. 28 (2) of the Provincial Insolvency Act is not necessary for a suit for such contribution against the Official Receiver in *C's* insolvency.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Tenali dated 3rd July, 1935, and passed in S. C. S. No. 412 of 1934.

V. Subramaniam for Petitioner.

K. Kotayya for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff filed a suit against the Official Receiver in an insolvency claiming half the amount of the costs which he had paid as an unsuccessful co-defendant in a partition suit filed against him, the debtor and others. The decree so far as it relates to costs, and to the petitioner is against him jointly and severally. His claim in the suit filed by him is that as he was forced by reason of the terms of the decree for costs to pay up the whole of the costs he is entitled to claim from the debtor half the amount which he (the petitioner) was compelled to pay. The lower Court has dismissed the suit on the ground that the leave of the Court to file the suit had not been obtained as is required by S. 28 (2) of the Provincial Insolvency Act. A few further facts must first be stated; and these are that the suit in respect of which the costs were awarded against the present petitioner was a suit for partition brought by a younger brother of the debtor claiming that certain alienations which had been made were to be set aside—and for this purpose the alienees were made party defendants—and also to have declared void certain bonds executed. During the pendency of that suit the debtor who was the second defendant in it was adjudicated an insolvent

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and after his adjudication the decree in the partition suit and also as regards the costs was passed. There is, therefore, if the plaintiff's claim for contribution is good, a debt, *i.e.*, the decree for costs, to which the debtor had become subject after his adjudication but before his discharge and for the purpose of seeing whether the leave of the Court is required when a suit in respect of such a debt is filed S. 34 of the Provincial Insolvency Act has to be examined. The position being as I have already stated the question is whether it is a debt that is provable or not. It is provable if in respect of it the debtor had incurred before adjudication any obligation to the plaintiff-petitioner, that is to say, the debtor must, where the debt is incurred after his adjudication and before his discharge, have been under an obligation to the claimant before the date of the adjudication and it is only if he was that the suit debt will be one provable in insolvency. The position I think is quite clear where a claim for costs is made against an insolvent's estate, the order for the payment of costs being subsequent to the date of the adjudication. The position is this, that if a plaintiff starts a suit against another person and during the pendency of the suit that other person becomes an insolvent and subsequent to the adjudication a decree is obtained, the plaintiff can prove in the insolvency both as regards the amount obtained under the decree and as regards the costs awarded, the costs being added to the decretal amount. This position has been clearly stated in the judgment of Lindley, L.J., in In re *British Gold Fields of West Africa*[1] and since then that decision and the words of Lindley, L.J., have been frequently cited in other English decisions relating to the English Bankruptcy Act. But there is this all important condition which is also laid down in that the debt in respect of which the costs are an incident must be one which itself is provable in insolvency. Therefore what has to be seen here is whether the decree in respect of which the order for costs was made is one which is provable in insolvency and that is why an examination of S. 34 (2) becomes so necessary. The question is, what obligation was the debtor under towards the plaintiff-petitioner previous to the adjudication? It is argued that he was under some contingent liability to pay him the costs of the suit or something towards them. I do not agree.

1. (1899) 2 Ch. D. 7 at 11.

Marreddi Seshireddi v. Official Receiver, Guntur.

There was no liability whatsoever to do so until the decree had been passed, that is to say, so far as the plaintiff-petitioner is concerned. It could have been argued that if the facts had been those which Lindley, L.J., had in mind, certainly the debtor was under an obligation not only to pay the decretal amount to the plaintiff but also the costs which were incidental to the decree but it seems to me—and this appears to be conceded in the argument on behalf of the respondent—that in the present case, that is the suit in which the costs were awarded, the plaintiff in that suit, it being a partition suit, had no debt which was provable in the insolvency by reason of his decree and that therefore also he had no debt so far as it related to costs which was provable in insolvency. I think that the petitioner here is in even a stronger position than the plaintiff in the partition suit would have been. He was a co-defendant and it cannot be said that during the pendency of the suit the debtor was under the obligation, contingent or otherwise, towards the present petitioner. The obligation only arose when the order for costs was made which was subsequent to the adjudication. In my view, therefore, having regard to the words of S. 34 (2) of the Provincial Insolvency Act this suit debt was not one provable in insolvency. It follows, therefore, that leave of the Court to file the suit was not necessary and the lower Court's order dismissing the suit for the reason that no such leave had been obtained was wrong. This petition must, therefore, succeed with costs here and the order of the lower Court set aside and suit remanded for disposal according to law.

S. V. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE HORWILL.

The Public Prosecutor .. *Appellant**

v.

Marati Kunti Venkoba Rao and another .. *Respondents (Accused 1 and 2).*

Public Prosecutor v. Venkoba Rao.

Evidence Act (I of 1872), S. 27—Statements under—Mode of recording by Police Officers—Need for use of first person and exact words of accused—Use of confessional statement at trial—Principles governing.

* Crl. Appeal Nos. 615 and 660 of 1936. 25th January, 1937.

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Statements made by an accused person which contain information provable in evidence under S. 27 of the Indian Evidence Act should be clearly and carefully recorded by the Police Officer and they should be recorded in the first person. They should not be paraphrased.

When the Police have recorded the statements it will in each case be for the trial Court to decide how much of the statement is admissible in evidence under S. 27, that is to say, how much of such information as relates distinctly to the fact discovered may be proved. And in considering that the Court should bear in mind the fact that so much of such information, whether it amounts to a confession or not, may be proved provided that it relates distinctly to the fact thereby discovered.

Periakaruppan, In re, R.T. No. 11 of 1931 reported in (1931) 4 Mad. Cr. Cases 250 and *Sogaimuthu Padayachi* v. *Emperor,* (1925) I.L.R. 50 Mad. 274, referred to.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the order of the acquittal dated 15th September, 1936, of the aforesaid respondents under S. 302, Indian Penal Code, by the Sessions Judge of the Kurnool Division in Sessions Case No. 9 of 1936 on his file.

K. Venkataraghavachari for *The Public Prosecutor (L.H. Bewes)* on behalf of the Crown.

V. L. Ethiraj and *A. S. Sivakaminathan* for Respondents.

The judgment of the Court was delivered by

Mockett, J.

Mockett, J.—The first and second accused were charged before the Sessions Judge of Kurnool under two sections of the Indian Penal Code, namely, (1) under S. 364, abduction with intent to murder, and (2) under S. 302, murder, the person concerned in each case being one Veeranna who, it will later be seen, was unquestionably murdered on 13th October, 1935. The learned Sessions Judge has acquitted both the accused of murder and has convicted them both under S. 364, Indian Penal Code, has sentenced the first accused to transportation for life, and the second accused to rigorous imprisonment for 3 years. The first accused has appealed against his conviction (Criminal Appeal No. 660 of 1936) and the Crown has appealed against the acquittal of the accused for murder (Criminal Appeal No. 615 of 1936).

The first accused lives at Kurnool and the deceased woman Veeranna, was concerned with him in his business which unquestionably was that of an unauthorised practitioner. He seems to have written legal documents. He occupied part of a house in which P.Ws. 2 and 3 were also tenants. Opposite that house lived P.W. 8 and a little to the north is the house of P.W. 9. P.W. 20's house was somewhat to the south. An

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examination of the plan would show the situation of the rooms in the house. The second accused used to visit the first accused, and the deceased also used to visit the first accused. According to P.Ws. 2 and 3 shortly before the death of the deceased, the first accused introduced the deceased to the second accused and the first accused told the deceased that the second accused was possessed of evil spirits and that he should exorcise it. Apparently the deceased was supposed to possess the gift of exorcising evil spirits and she agreed to do so. The deceased went away and came back the next day and then certain mantrams were gone through with a view to exorcising the spirit. On 11th October, 1935, P.Ws. 2 and 3 who were student and teacher respectively were working till 10 o'clock in the night and went to bed about then. Whilst they were lying down but not asleep the first accused came out of his own room and said to the second accused "See if they (meaning the two witnesses) are asleep or not". A. 1 told A. 2 that they were asleep and so they could talk. Then according to this witness (P.W. 2) the following conversation took place and it is of the greatest importance in this case and we will record in extenso. "A. 1 told A. 2 to tell the deceased that she would advance Rs. 300 as a loan and that then she (the deceased) would go with them (accused 1 and 2) to Sankesula and they could murder her in the date tope near the jungle stream beyond the 11th mile on the way". It should be mentioned that A. 2 lived at Sankesula which is some 15 miles from Kurnool. Then A. 2 said 'suppose she cries out—it would be hard for us then". Then A. 1 told A. 2 "she would not cry. On the 5th A. 1 had made the necessary arrangement by going and returning". Then A. 2 said to A. 1 "what do we gain by murdering her". Then A. 1 said "we can take the gold jewels on her person, namely, bangles, sangalis, chain and ring. We can take her thumb impression and get her lands and houses and her iron safe which was in the Panchayat Court". Then according to P. W. 2, A. 2 said "it is alright". Next morning, that is to say, on the 12th October 1935, P. W. 2 states that he challenged A. 1 in the presence of P. W. 3 about the conversation, whereupon A. 1 said if he divulged it to anybody he would kill them both. P. W. 2 replied "We are not concerned in divulging it". That evening A. 1 and A. 2 and the deceased were in A. 1's room. Everybody went to bed as usual, but

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at 2 A.M., P. W. 2 says he was aroused by Ahmed Khan, the *jutkawala*, P. W. 4, treading on his hand. Shortly, his account of what happened amounts to this, that A. 1 and A. 2 went away with the deceased in P. W. 4's *jutka*, and according to P. W. 3, A. 1 had what he calls "a stick" with him which we have had produced before us and is marked M. O. 2. It is not a stick; it is a pounder, obviously a very dangerous weapon. That is the story so far, up to that time, of P. W. 2. P. W. 3 tells in substance the same story. He does not mention that A. 2 after protesting said "All right". P.W. 3 corroborates that A. 1 told him that if he divulged it to any one, he would kill them. P. Ws. 2 and 3 state that next morning they woke up early and went to the Circle Inspector's house and it is a fact that they recorded Ex. B, the First Information Report. This is a document of the utmost importance. It tells in substance the story which we have set out, but it also says that two other men, Madadu and Mallagadu, were to be parties to this murder and they are described according to Ex. B. The accused had been in consultation with them for some time before. It is important to note that in Ex. B, the statement appears "Last night at about 2 o'clock, Veeramma started out in the *jutka* of Ahmed Khan (P. W. 4) as Hanumamma promised to give her, at Sankesula Rs. 300, for liquidating her debts". The learned Counsel for the appellant have quite rightly stressed and stressed very strongly—the fact that the detailed conversation which we have set out and which is contained in the evidence at the Sessions as to what A. 2 said and as to what A. 1 said, was not so stated in Ex. B, and the learned Counsel for the 2nd accused attaches great importance to that, because according to his argument, if that evidence is eliminated (that is the evidence given at the Sessions) there is very little evidence against his client on which she should be even convicted under S. 364, Indian Penal Code. But it must be observed, as we have emphasised before, that in both the statements, it is stated that it was arranged that the 2nd accused should promise to give Rs. 300 to the deceased and that the 2nd accused should go to Sankesula. We may say at once that in spite of the criticisms launched at the evidence of P. W.'s 2 and 3, we are perfectly satisfied that that evidence is acceptable. It is a very remarkable case of a statement which if given after the discovery of a murder, might have been strongly criticised. But it was given before, and no cross-examination was ever directed

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to the police officers concerned to suggest that the time of recording Ex. B has been past-dated for the purpose of the prosecution case. Ex. B was given at 6 A.M. A. 1 was arrested at about half past seven. The body was not found till 3 A.M., on the 14th, that is to say, on the next day and as will appear, was discovered on information supplied by A. 1 himself. So, with regard to the fact of the murder, it was anticipated in Ex. B, and as will be seen from the rest of the evidence, many of the facts relied on in Ex. B are corroborated by evidence which would not have been at the time and which was only discovered later by investigations by the police.

[His Lordship discussed the evidence in the case and concluded:]

The result will now be that the appeal of A. 1 will be dismissed. The appeal of the Crown with regard to A. 2 will be dismissed. The appeal of the Crown with regard to A. 1 will be allowed. With regard to the sentence we have naturally given this matter the most anxious consideration, because this is after all an appeal against an acquittal, and although there is no practice laid down, we should often be reluctant in an appeal against an acquittal to pass a sentence of death. In this case, however, we consider we should be failing in our duty if we did anything else. This was a particularly cruel murder, carefully planned and deliberately carried out, and we consider that the proper sentence for us to pass is that the first accused should be hanged by the neck till he is dead. With regard to the question of sentence on the second accused we consider that notice should go to the second accused to show cause why her sentence should not be enhanced.

Before leaving this case, we desire to point out that the method of recording statements given under S. 27 followed in this case is most unfortunate and this Court in Criminal Appeal No. 530 of 1936 has pointed out that statements made by an accused person which contain information provable in evidence under S. 27 of the Indian Evidence Act should be clearly and carefully recorded by the Police Officer and they should be recorded in the first person. They should not be paraphrased. Obviously if what a man says is to be used in evidence his exact words should be used and not what a policeman or anyone else says he said. That is sufficient comment with regard to this aspect of it. When the police have recorded the statement, it will in each case be for the trial Court to decide how much of

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the statement is admissible under S. 27; that is to say, how much of such information as relates distinctly to the fact discovered may be proved. And in considering that, the Court should bear in mind the fact which seems to have entirely escaped the notice of many Sessions Judges in this Presidency recently, that is, that so much of such information whether it amounts to a confession or not may be proved provided that it relates distinctly to the fact thereby discovered. A decision of this Court in *Periakaruppan,* In re[1], deals with this topic. It is so pointed out there that under S. 27, the whole statement which leads to the discovery may be given in evidence and it was further held that on no account should a statement be altered. See also *Sogaimuthu Padayachi* v. *Emperor.*[2] We agree with the principles laid down in that case although we are not wholly able to follow how they were applied to the actual facts before the Court. The statement in that case was sought to be admitted in its entirety. Of course, it will be for the Court in each case to say how much of the statement leads to the discovery of the facts in each case. If it is necessary in order to make sense of the statement of the accused to set out any question put to him that should obviously be done. The present practice which frequently occurs of police officers going into the box and saying some such thing as this, "the accused said he would show the aruval" or "the accused said he would show the 'body' or 'the jewels' is wrong". Obviously these are not the words of the accused but a mangled and incomplete paraphrase. We hope that the Courts will take notice of these observations.

B.V.V. —— *Acquittal set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE HORWILL.

Minor Sethurajan by Guardian
Nataraja Sethurayan .. *Appellant* (Respondent-3rd Defendant)*

v.

Guruswami Pathar .. *Respondent (Petitioner-Plaintiff).*

Sethurajan *v.* Guruswami Pathar.

Execution—Decree on the face of it valid—Plea of minority of defendant raised for the first time in execution—Whether the executing Court could investigate the legality of the decree—S. 47, Civil Procedure Code (V of 1908)).

1. Cr. A. No. 38 of 1931 and R.T. No. 11 of 1931 reported in (1931) 4 Mad. Cr. Cases 250.
2. (1925) I.L.R. 50 Mad. 274.

* A. A. A. O. No. 146 of 1933. 25th January, 1937.

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Where a decree-holder obtained a decree against the father of the appellant and the appellant himself and impleaded the appellant as a major, but in execution the appellant appeared by his mother and pleaded he was a minor and the lower appellate Court held that the matter could not be raised in execution and that the proper remedy was by way of suit,

Held, that S. 47, Civil Procedure Code, is not intended to be used for the purpose of investigating matters relating to validity of the decree itself when on the face of it there is nothing illegal about the decree.

Govindan Nadar v. *Natesa Pillai*, (1931) 61 M.L.J. 520 and *Lakshmanan Chettiar* v. *Chidambaram Chettiar*, (1934) 68 M.L.J. 318: I.L.R. 58 M. 752, followed.

Kalipada Sarkar v. *Hari Mohan Dalal*, (1916) I.L.R. 44 Cal. 627 and *Gora Chand Haldar* v. *Prafulla Kumar Roy*, (1925) I.L.R. 53 Cal. 166 at 173 (F.B.), relied on.

Per *Horwill, J.*—There is no definite current of decisions in any High Court to the effect that an execution Court, whose business it is to execute, should institute an enquiry at the instance of any person to ascertain whether a decree, to all appearances a perfectly valid one, may not for some reason or other be invalid. It is against the well-established principles, governing the duties of an executing Court, that it should sit in judgment over a Court that has passed a decree, which may even be a superior Court.

S. A. Nathan v. *S. R. Samson*, (1931) I.L.R. 9 Rang. 480 (F.B.), explained and dissented from.

Appeal against the order of the District Court of East Tanjore at Negapatam dated the 18th February, 1933 and made in Appeal Suit No. 79 of 1932 preferred against the order of the Court of the District Munsif of Shiyali dated 22nd June, 1932 and made in Misc. Appln. No. 25 of 1932 in O. S. No. 29 of 1929.

S. R. Muthuswamy Aiyar for Appellant.

M. S. Venkatrama Aiyar for Respondent.

The Court delivered the following

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JUDGMENTS. *Mockett, J.*—This is a second appeal against the order of the District Judge of East Tanjore allowing the appeal against the order of the District Munsif of Shiyali. The decree-holder respondent obtained a decree against the father of the appellant and the appellant. He impleaded the appellant as a major. In execution the third defendant obstructed and a petition was put in by the decree-holder to have his obstruction removed and possession of the property delivered. The appellant then appeared by his mother as guardian and pleaded that he was a minor. The lower Court having so found, dismissed the petition. The lower appellate Court allowed the appeal on the grounds that this matter could not be raised by the appellant in execution and that his proper

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remedy was by way of suit. The point for decision is which of these two views is correct.

The appellant has argued that under O. 21, r. 99, the petition was correctly dismissed because he being a minor, was in the same position as a person "other than the judgment-debtor", and according to the ruling of the Privy Council in *Rashid-un-nisa* v. *Muhammad Ismail Khan*[1], the appellant not having been properly represented, was not a party at all. That argument, however, seems to beg the question in this case, which is, at what stage should the question of minority be gone into. And it is to be observed that in the abovementioned case, the question was raised in connection with S. 244 of the Code of 1882 (corresponding to S. 47 of the present Code) and it was held that a suit to set aside execution proceedings by a minor on the ground of non-representation was not barred by the above section. There are conflicting authorities on the subject. In *Sami Chettiar* v. *Sesha Aiyar & Co.*[2], Devadoss, J., took the view that the question of a defendant being a minor could be taken at any time, even in execution. And in *Venkata Someswara Rao* v. *Lakshmanaswami*[3], Kumaraswami Sastri, J., one of the referring Judges, stated that, at least, on the balance of convenience, it was better that the question whether a decree was void by reason of the defendant being a minor should be gone into in execution and not by means of a suit. Devadoss, J., at page 284 says:

"The second question is, can the executing Court entertain an objection to the execution of the decree against a minor on the ground that the guardian *ad litem* had an interest adverse to that of the minor in the suit? If the decree is not illegal on the face of it, is it open to the executing Court to go behind it?".

He then goes on to say that it is open to the minors to have these matters investigated in a suit. Kumaraswami Sastri, J., seems to draw a distinction between a void and a voidable decree. In the former, he considers that the matter can be investigated in execution and so does Devadoss, J. The Full Bench set at rest none of these questions. It is necessary to say a few words with regard to Kumaraswami Sastri, J.'s suggestion that the balance of convenience is in favour of investigating the question of minority, in execution. That may be so, and that comment might frequently be made with

1. (1909) 19 M.L.J. 631: L.R. 36 I.A. 168: I.L.R. 31 All. 572 at 582 (P.C.).
2. A.I.R. 1928 Mad. 1057.
3. (1928) 56 M.L.J. 175: I.L.R. 52 Mad. 275 (F.B.).

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regard to the preferability of investigations in execution to those in a suit. But, with great respect, it does not seem to me to satisfy the test laid down by S. 47. The point that is raised in such cases seems to be not one "relating to the execution, discharge or satisfaction of the decree," but amounts to a plea that the decree is void and that it was wrongly passed by the trial Court. An examination of the cases mentioned shows that they are not direct decisions on this point, the observations in favour of the appellant in these cases being *obiter*. But the matter has been directly dealt with in two recent decisions of this High Court. In *Govindan Nadar* v. *Natesa Pillai*[1], Jackson, J., had to deal with this very question. In that case, it was raised in execution that the defendant was a lunatic, unrepresented. Jackson, J., following the decisions of the Calcutta High Court in *Kalipada Sarkar* v. *Hari Mohan Dalal*[2] and *Gora Chand Haldar* v. *Prafulla Kumar Roy*[3], took the view that it was not open to the executing Court to go into the matter. The rule to be derived from *Gora Chand Haldar* v. *Prafulla Kumar Roy*[3], seems to be that the voidness of the decree must be apparent on the face of it. Jackson, J., observes that the rule laid down by the Calcutta High Court conforms with the universally recognised principle, and he accepted those decisions. In *Lakshmanan Chettiar* v. *Chidambaram Chettiar*[4] a Bench of this High Court (Curgenven and Cornish, JJ.) has expressed approval of the above decision of Jackson, J., and prefers his view to that of Oldfield, J., in *Subramania Aiyar* v. *Vaithinatha Aiyar*[5] and Madhavan Nair, J., in *Arunachalam Chetty* v. *Abdul Subhan Sahib*[6]. It may be mentioned that the High Court of Rangoon in *S. A. Nathan* v. *S. R. Samson*[7] has dissented from the Full Bench decision of the Calcutta High Court in *Gora Chand Haldar* v. *Prafulla Kumar Roy*[3]. I prefer the Calcutta view expressed in *Kalipada Sarkar* v. *Hari Mohan Dalal*[2] and *Gora Chand Haldar* v. *Prafulla Kumar Roy*[3]. I do not consider that S. 47, Civil Procedure Code, is intended to be used for the purpose of investigating matters relating to the validity of the decree itself when on the face of it there is nothing illegal about the decree. Cases in which pleas of minority might be deliberately

1. (1931) 61 M.L.J. 520. 2. (1916) I.L.R. 44 Cal. 627.
3. (1925) I.L.R. 53 Cal. 166 at 173 (F.B.).
4 (1934) 68 M.L.J. 318 : I.L.R. 58 M. 752. 5. (1913) I.L.R. 38 Mad. 682.
6. (1925) 50 M.L.J. 232. 7. (1931) I.L.R. 9 Rang. 480 (F.B.).

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withheld for the purpose of obstructing future execution proceedings can be easily imagined and I am not impressed by the argument as to hardship. As to the question of hardship, in suitable cases, the Court in which the suit is filed to set aside the decree can always, by interlocutory orders, make provision against the minor's property being unjustly sold.

As to the point raised that the order of the District Munsif was not appealable it is quite clear that he purported to make it under S. 47 and there is no substance in this contention as a result of these conclusions I would dismiss this appeal with costs.

Horwill, J.—I agree.

Horwill, J.

There is no definite current of decisions in any High Court to the effect that an executing Court, whose business it is to execute, should institute an enquiry at the instance of any person to ascertain whether a decree, to all appearances a perfectly valid one, may not for some reason or other be invalid. It is against the well-established principles governing the duties of an executing Court that it should sit in judgment over a Court that has passed a decree, which may even be a superior Court. Cases do however arise where the executing Court is forced to notice that a decree is not executable and in such cases it should not execute. The unexecutability of the decree may be obvious from a perusal of the judgment and the pleadings, or it may appear, when a decree-holder is seeking to make a legal representative of a judgment-debtor liable that the legal representative is not liable, because no decree was passed against the judgment-debtor while he was yet alive. Executing Courts must recognise these facts. I do however feel that it would be against the trend of decisions, above all the decisions since the closely reasoned-judgments in *Kalipada Sarkar* v. *Hari Mohan Dalal*[1] to countenance an enquiry in execution whether a judgment-debtor was a minor. Although the principal case relied on by the appellant *S. A. Nathan* v. *S. R. Samson*[2], disagrees with *Gora Chand Haldar* v. *Prafulla Kumar Roy*[3], regarding the distinction between a decree that is void on the face of it and one that is found to be void after enquiry, yet the effect of the judgment in *S. A. Nathan* v. *S. R. Samson*[2] is to make an exception only

1. (1916) I.L.R. 44 Cal. 627. 2. (1931) I.L.R. 9 Rang. 480 at 482 (F.B.).
3. (1925) I.L.R. 53 Cal. 166 (F.B.).

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with regard to a judgment-debtor who died before decree, a special case since distinguished even by the Calcutta High Court. In most of the decisions placed before us on behalf of the appellants the effect of the Privy Council case, *Rashid-un-nisa* v. *Muhammad Isma'l Khan*[1] has not been considered; but in the Rangoon case it is recognised that this decision of the committee does stand in the way of an enquiry regarding the minority of a judgment-debtor. When a judgment-debtor appears in execution and asserts that he is a minor he is in fact saying that he was not a party to the decree, which admission precludes the executing Court from making an enquiry under S. 47, Civil Procedure Code.

It is argued that if the District Munsif had no authority under S. 47 to go into this matter his order was not one under S. 47 and so is not appealable. The fallacy of this argument is that although the District Munsif ought not to have made this enquiry he assumed jurisdiction and purported to pass an order under S. 47, Civil Procedure Code. His order, wrongly given though it was, was therefore under S. 47, Civil Procedure Code, and appealable.

The respondent has put forward an alternative answer to the appellant. It is that as two brothers of the appellant, with identical rights and liabilities, were parties to the decree, they sufficiently represented the minor appellant. This is a reasonable contention but it is weakened if not vitiated by the fact that the plaintiff did not treat them as representatives of the appellant's interest because he impleaded him, as well as his brothers. In view of the fact that the appeal fails otherwise we have not thought it necessary to decide this rather nice point.

K. C. *Appeal dismissed.*

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1. (1909) 19 M.L.J. 631: L.R. 36 I.A. 168: I.L.R. 31 All. 572(P.C.).

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner, Central Provinces.]

PRESENT:—LORD RUSSELL OF KILLOWEN, LORD MACMILLAN AND SIR JOHN WALLIS.

The Commissioner of Income-tax, United and Central Provinces .. *Appellant**

v.

Badridas Ramrai Shop, Akola, owner Laxminarayan Badridas Shrawagi of Akola .. *Respondent.*

P.C. — Commissioner of Income-tax, United and Central Provinces *v.* Badridas Ramrai Shop, Akola,

Income-tax—Unsatisfactory return of income made by taxpayer—Assessment made by officer "to the best of his judgment"—Sufficient cause shown for non-compliance with notice to produce evidence—Whether relevant to excuse failure by taxpayer to comply with notice to produce accounts—Procedure for making best of judgment assessment—Questions of fact—Reference by Income-tax Officer—Permissibility—Indian Income-tax Act (XI of 1922 as amended), Ss. 22, 23, 27, 30, 31, 33, 66 (2).

A taxpayer having made an unsatisfactory return of his income, the Income-tax Officer served on him a combined notice requiring him, under S. 22 (4) of the Indian Income-tax Act, 1922, to produce his accounts, and under S. 23 (2) of the Act, to produce evidence in support of his return. The taxpayer obtained an adjournment of the date specified by the notice for compliance, and, on the adjourned date, applied again for adjournment on the ground of his alleged illness but the officer refused to adjourn the case. No accounts having been produced, the officer made an *ex parte* assessment on the taxpayer as provided by S. 23 (4) of the Act, taking into account for that purpose matters of local repute and the fact that the taxpayer was the richest man in his district. The taxpayer applied under S. 27 for cancellation of the assessment, but he merely showed sufficient cause for not producing the accounts in person, and his application was refused. The Assistant Commissioner dismissed the taxpayer's appeal to him against that decision, and the taxpayer thereupon applied to him to refer a case to the High Court under S. 66 (2), which reference was duly made. The Court of the Judicial Commissioner, Central Provinces, decided that a new assessment must be made. The Commissioner of Income-tax preferred an appeal to Privy Council against the said decision.

Held, that the failure of the taxpayer either to comply with the notice under S. 22 (4) to produce accounts or to show sufficient cause for that failure, made it compulsory on the Income-tax Officer to make an assessment *ex parte*, there being no question of his exercising a judicial discretion in the matter, and the fact that the taxpayer had shown sufficient cause for non-compliance with the notice under S. 23 (2) to produce evidence was irrelevant for that purpose. And, even if the officer had been exercising a judicial discretion in deciding to make an assessment *ex parte*, he would not have been exercising it wrongfully by failing to give previous intimation of his intention to refuse an application for an adjournment, and the questions involved being questions of fact the reference under S. 66 (2) should not have been made.

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* P. C. Appeal No. 43 of 1936. 19th February, 1937,

P.C.

Commissioner of Income-tax, United and Central Provinces *v.* Badridas Ramrai Shop, Akola.

Held, further, that in making an assessment *ex parte* under S. 23 (4), the Income-tax Act imposed no obligation on the Income-tax Officer either to conduct any kind of local enquiry or to record a note of the details and results of that enquiry, and that in this case the officer made the assessment to the best of his judgment within the meaning of the sub-section. S. 23 (4) of the Act places the Income-tax Officer in the position of a person whose decision as to amount is final subject to no appeal, but whose decision, if it can be shown to have been arrived at without an honest exercise of judgment may be revised or reviewed by the Commissioner under the powers conferred upon that official by S. 33 of the Act.

Abdul Bari Chowdhury v. *Commissioner of Income-tax, Burma,* (1931) I.L.R. 9 Rang. 281 (F.B.), approved.

Appeal by the Commissioner of Income-tax, Central Provinces, from a decision of the Court of the Judicial Commissioner, Central Provinces, dated 12th April, 1934, on a case stated under S. 66 (2) of the Indian Income-tax Act, 1922, by the Assistant Commissioner of Income-tax, Nagpur.

The relevant sections of the Income-tax Act which have been set out in the judgment are the following:—

"22.—(1) . . . .

"(2) In the case of any person other than a company whose total income is, in the Income-tax Officer's opinion, of such an amount as to render such person liable to income-tax, the Income-tax Officer shall serve a notice upon him requiring him to furnish, within such period, not being less than thirty days as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) his total income during the previous year.

"(3) If any person has not furnished a return within the time allowed by or under sub-S. (1) or sub-S. (2), or having furnished a return under either of those sub-sections, discovers any omission or wrong statement therein, he may furnish a return or a revised return, as the case may be, at any time before the assessment is made, and any return so made shall be deemed to be a return made, in due time under this section.

"(4) The Income-tax Officer may serve on the principal officer of any company or on any person upon whom a notice has been served under sub-S. (2) a notice requiring him, on a date to be therein specified, to produce, or cause to be produced, such accounts or documents, as the Income-tax Officer may require:

"Provided that the Income-tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year."

"23.—(1) If the Income-tax Officer is satisfied that a return made under S. 22 is correct and complete, he shall assess the total income of the assessee, and shall determine the sum payable by him on the basis of such return.

"(2) If the Income-tax Officer has reason to believe that a return made under S. 22 is incorrect or incomplete, he shall serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend at the Income-tax Officer's office or to produce, or to cause to be there produced, any evidence on which such person may rely in support of the return.

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" (3) On the day specified in the notice issued under sub-S. (2), or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points, shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment.

" (4) If the principal officer of any company or any other person fails to make a return under sub-S. (1) or sub-S. (2) of S. 22, as the case may be, or fails to comply with all the terms of a notice issued under sub-S. (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-S. (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment and, in the case of a registered firm, may cancel its registration:

" Provided . . ."

" 27. Where an assessee or, in the case of a company, the principal officer thereof, within one month from the service of a notice of demand issued as hereinafter provided, satisfies the Income-tax Officer that he was prevented by sufficient cause from making the return required by S. 22, or that he did not receive the notice issued under sub-S. (4) of S. 22, or sub-S. (2) of S. 23, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying, with the terms of the last-mentioned notices, the Income-tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of S. 23."

" 30.—(1) Any assessee objecting to the amount or rate at which he is assessed under S. 23 or S. 27, or denying his liability to be assessed under this Act, or objecting to a refusal of an Income-tax Officer to make a fresh assessment under S. 27, or to any order against him under sub-S. (2) of S. 25 or S. 25-A or S. 28, made by an Income tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order:

" Provided that no appeal shall lie in respect of an assessment made under sub-S. (4) of S. 23, or under that sub-section read with S. 27.

" (2) . . .

" (3) . . ."

" 31.—(1) . . .

" (2) The Assistant Commissioner may, before disposing of any appeal, make such further inquiry as he thinks fit, or cause further inquiry to be made by the Income-tax Officer.

" (3) In disposing of an appeal the Assistant Commissioner may, in the case of an order of assessment,—

"(*a*) confirm, reduce, enhance or annul the assessment, or

"(*b*) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment. . . .

" (*c*) . . .

" (*d*) . . .

" Provided . . ."

" 33.—(1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any authority subordinate to him or by himself when exercising the power of an Assistant Commissioner under sub-S. (4) of S. 5.

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"(2) On receipt of the record the Commissioner may make such enquiry or cause such enquiry to be made, and, subject to the provisions of this Act, may pass such orders thereon as he thinks fit:

"Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard."

The following statement of facts is taken from their Lordships' judgment:

The respondent taxpayer was served on the 29th April, 1931, with a notice under S. 22 (2), and furnished a return, dated the 27th July, 1931, which consisted of a printed return form, and contained two statements only, namely, (*a*) opposite the paragraph relating to business, the words and figures "Rs. 1,700. Approximate amount of loss," and (*b*) in the place where should appear the total amount of profit and gains or income, the same words and figures. A return in such a form was obviously unsatisfactory and incomplete. The officer thereupon served upon the respondent on the 8th September, 1931, a combined notice requiring him [under S. 22 (4)] to "produce or cause to be produced at my office" his accounts for three years, and [under S. 23 (2)] either to attend or to produce or cause to be produced any evidence on which he might rely in support of his return. The date specified was the 14th September, 1931. On the 12th September, 1931, he applied for and obtained an adjournment until the 19th October, 1931, for which date a fresh combined notice was issued and served on the 23rd September, 1931.

On the 19th October, 1931, the respondent applied in writing for a further adjournment, alleging that he had been ill for the previous month and could do no work, and that his agent, who had been away, had returned. With this application he seems to have sent a medical certificate, which, however, merely stated that the respondent "was suffering from influenza some fifteen days ago," that he had gone very weak since that time, and that he was still weak and suffering from a cough.

The officer was unable to accept such a certificate, and refused to grant any further adjournment, for he took the view that the application, backed by such a certificate, was merely a device to obtain a postponement. No accounts were produced or caused to be produced by the respondent, and the officer proceeded, as enjoined to do by S. 23 (4), to make the

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assessment to the best of his judgment. No accounts being available, he took into consideration the local repute that the respondent's money-lending business was extensive and included the purchasing of debts at large profit to himself, and that he was easily the richest man in the district. Further, as stated in the assessment note, "local inquiries" had shown that his fluid resources amounted to ten lacs. The officer estimated the respondent's income at one lac.

From an assessment made under S. 23 (4) there is no appeal; but the assessee may endeavour to satisfy the officer as to the relevant question of fact specified in S. 27, and, if he succeeds, the officer must cancel the assessment and make a fresh assessment in accordance with the provisions of S. 23. The respondent applied for cancellation under that section. His application was heard (with witnesses) in December, 1931, by the Income-tax Officer then in office, who refused the application. The only excuse alleged by the respondent for his failure to comply with the notice relating to the production of accounts was that he could not attend to produce them in person. As he could have caused them to be produced by sending them by messenger, he failed to satisfy the officer as required by S. 27.

From this refusal the respondent, as entitled under S. 30, appealed to the Assistant Commissioner. His appeal was heard on the 27th February, 1932, and was rejected on the ground that he had not been able to show that he had sufficient cause for withholding the accounts on the 19th October, 1931. The assessment was accordingly confirmed by order made under S. 31.

Down to this point in the history of this matter it appears to their Lordships that the provisions of the Act had been strictly complied with by the income-tax officials. No further appeal lay open to the respondent, but it was no doubt open to the Commissioner to exercise the powers of revision or review contained in S. 33.

The respondent, however, applied to the Commissioner for a reference under S. 66 (2) of the Act, which, so far as material, provides:

" Within sixty days of the date on which he is served with notice of an order under S. 31 . . . the assessee . . . may . . . require the Commissioner to refer to the High Court any question of law arising out of such order . . . and the Commissioner shall . . . draw up a statement of the case and refer it with his own opinion thereon to the High Court."

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The Commissioner may, by sub-section (3), refuse to state the case, on the ground that no question of law arises.

The respondent asked to have referred seven alleged points of law, which were formulated thus:—

(i) Whether the Income-tax Officer was justified in assuming jurisdiction to proceed under S. 23 (4) of the Income-tax Act and making *ex parte* assessment in this case when there is no legal evidence to show that the assessee deliberately derived non-compliance or failed to comply with the notice issued under S. 22 (4) of the Income-tax Act.

(ii) Whether the circumstances alleged and proved by the assessee could not in law be deemed to be "sufficient cause" under S. 27 of the Income-tax Act.

(iii) In view of the wording of the notice under S. 22 (*a*) (*sic*) of the Act and the undisputed fact that the assessee was too ill to attend the Court and the further admitted fact that the Income-tax Officer did not pass or communicate to the assessee's servant or to the assessee any order for immediate production of account books or any other fair order, could not the assessee under law claim cancellation of the *ex parte* assessment order, dated the 19th October, 1931.

(iv) Whether procedure adopted by the Income-tax Officer in causing notices to be served under Ss. 23 (2) and 22 (4) of the Income-tax Act was legal and proper and whether the Income-tax Officer could under the circumstances proceed under S. 23 (4) and make *ex parte* assessment.

(v) Is there evidence to substantiate the Income-tax Officer's reasoning in the last paragraph of the order saying that legal enquiries prove that the assessee made in the account year taxable income of a *lakh* of rupees.

(vi) Is not the judgment of the Income-tax Officer vitiated by imaginary assumptions or irregular enquiries, and hearsay evidence which the assessee has no chance to meet and which are not borne out by his account books which the Income-tax Officer could have called for.

(vii) Is the order of assessment passed by the Income-tax Officer to the best of his judgment in view of the arbitrary reasons he has given and despite the notorious trade depression and financial strain all along.

The Commissioner in the case which he stated, stated his opinion upon the seven points as follows:—As to (i), the assessee could, on the evidence, have sent the accounts even if (which the medical evidence did not establish) he could not bring them himself. He had not therefore complied with the terms of the notice under S. 22 (4), and the point should be answered against the assessee. As to (ii), the question was one of fact and not of law, and could not be referred to the High Court. As to (iii), the reference to S. 22 (*a*) was admitted to be intended as a reference to S. 22 (4), and, as the accounts could have been produced by someone on the assessee's behalf, that point should be answered against the respondent. As to (iv), if it meant that because a notice was served under S. 23 (2), a notice under S. 22 (4) was illegal, and that non-compliance with an illegal notice would not

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authorise an assessment under S. 23 (4), the point was covered by a recent decision by the Full Bench of the Lahore High Court which was adverse to the respondent's contention. As to (v), no evidence was necessary; the officer had merely to estimate the income as best he might for purposes of assessment. If any reasons were given, as in the present case, it was merely in order to show that the estimate was not arbitrary. As to (vi) and (vii), in view of his opinion as to (v), there was no occasion to answer these.

The reference was heard in the Court of the Judicial Commissioner, Central Provinces (which was a High Court for the purposes of S. 66) by a Judicial Commissioner and an Assistant Judicial Commissioner. They held, with regard to points (i) and (iv), that the notice was legal, and that the officer had jurisdiction to make the summary assessment under S. 23 (4); but they thought that the omission to make and communicate to the respondent a definite order refusing an adjournment did "considerably detract from the technical legality of the summary assessment order." They answered these points in the affirmative, *i.e.*, against the respondent. With regard to points (ii) and (iii), they considered whether the findings of the officer and the Assistant Commissioner that the respondent " had not shown sufficient cause for re-opening the *ex parte* assessment satisfies the test that it was arrived at after the exercise of judicial discretion," and they held that several relevant facts had been left out of consideration, namely, (1) that, if the respondent's Court agent had been informed that no adjournment would be granted because the account books should have been sent with the *Munim*, it was possible that the notice for production might have been complied with; (2) that the officer's failure to observe " this elementary rule " had contributed to the non-compliance with the terms of the notice; and (3) that the respondent desired to testify in person to the accuracy of the account books. They were of opinion that, on the finding that the respondent could not by reason of illness himself attend the Court on the appointed day, the only reasonable finding which should have been recorded was that the respondent had shown sufficient cause for non-compliance with the terms of the notice under S. 23 (2) [*i.e.*, the notice as to evidence, not the notice as to producing accounts], and that it followed that he had clearly made out sufficient cause for reopening the assessment; and

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that the officer and Assistant Commissioner had failed to exercise their discretion on reasonable and proper grounds.

[They then proceeded to consider points (v), (vi) and (vii), and held, as a result of an examination of certain authorities, that no assessment would be an assessment by the officer "to the best of his judgment" within the meaning of S. 23 (4) unless (1) a local inquiry to ascertain the income for the previous year of the proposed assessee were first held, and (2) the officer placed "on the record a note of the details and results of his inquiry." They held that the present assessment rested merely on the caprice of the officer and was not made "to the best of his judgment" within the meaning of S. 23 (4). They answered point (v) in the negative, point (vi) in the affirmative, and point (vii) in the negative.]

Wallach for Appellant.—The Income-tax Officer had jurisdiction to serve the respondent with notices under Ss. 22 (4) and 23 (2) of the Act, and the respondent failed to comply with the terms of either notice. The officer had a discretion as to whether he would or would not grant the further adjournment asked for by the respondent on 19th October, 1931, and there is no evidence that, in refusing to grant a further adjournment, he did not exercise his discretion properly. Moreover, the officer was not bound to communicate to the respondent or to anyone on his behalf beforehand his decision not to grant the adjournment. On non-compliance by the respondent with the two notices, or either of them, the officer was bound in law to make an assessment under S. 23 (4), and, in those circumstances, the amount of the assessment had to be estimated by the officer to the best of his judgment. With regard to that, it must be presumed, in the absence of proof to the contrary, that, in estimating the respondent's income and in making an assessment the officer acted according to the best of his judgment, and there is in fact no evidence to the contrary. No question of law arises as to the materials on which the officer exercised his judgment in making an assessment under S. 23 (4). Further, the question whether the respondent was prevented by sufficient cause from complying with the terms of the notices is a question of fact; accordingly, no questions of law arose for reference under S. 66 (2), and that reference should not have been made. There was no evidence that the respondent had been prevented by any cause from complying with the notice under S. 22 (4) (to produce accounts), and there was no power in the officer to cancel the assessment unless the respondent satisfied him, or, on appeal, the Assistant Commissioner, that he had been prevented by sufficient cause from complying with the terms of the notices issued under the two sub-sections.

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There was no appearance by or on behalf of the respondent tax-payer.

19th February, 1937. The judgment of the Board was delivered by

LORD RUSSELL OF KILLOWEN.—[After setting out the relevant provisions of the Income-tax Act and the facts of the case as set forth above His Lordship continued as follows:] Their Lordships find themselves in disagreement with the decision of the Court of the Judicial Commissioner, except in so far as it answered points (i) and (iv) in the affirmative, and decided that the officer was, in the events which had happened entitled to proceed to make an *ex parte* assessment under S. 23 (4). If the assessment in this case was in fact made by the officer to the best of his judgment, it had to stand unless the assessee succeeded in satisfying the officer that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying, with the terms of the notice under S. 22 (4) requiring him to produce, or cause to be produced, his accounts for three years. This he failed to do, and upon the undisputed and indisputable facts of the case he necessarily so failed. His application under S. 27 for cancellation of the assessment was doomed to failure, and his appeal to the Assistant Commissioner under S. 30, was equally incapable of success. There the matter should have ended, unless the Commissioner chose to proceed under S. 33. The questions involved were purely ones of fact, indeed, one might say of self-evident fact, and no reference with regard to them should have been made under S. 66 (2). No question of law was involved; nor is it possible to turn a mere question of fact into a question of law by asking whether, as a matter of law, the officer came to a correct conclusion upon a matter of fact. The Judicial Commissioners have treated the matter as a wrongful exercise of a judicial discretion, the foundation for the allegation of wrongful conduct being the facts that (1) no previous intimation had been given of the officer's intention to refuse a further adjournment on the 19th October, 1931, which they characterised as a failure to observe an elementary rule; and (2) the respondent had shown sufficient cause for not complying with the notice under S. 23 (2).

Their Lordships are unable to appreciate this reasoning. This does not appear to be a case of exercising a discretion. Under S. 23 (4), the fact of the taxpayer's failure to comply

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with the notice under S. 22 (4) made it compulsory on the officer to make an assessment; and, under S. 27, unless the officer is satisfied (and he was not, nor, on the facts of this case, could he have been) that the respondent had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying, with that notice, the assessment must stand. That he had sufficient cause for not complying with another notice, namely, that under S. 23 (2) is irrelevant. Further, their Lordships are unaware of any rule by which the officer ought to have announced or was bound to announce beforehand how he proposed to deal with an application for an adjournment. The respondent had already obtained one adjournment from the 14th September, 1931, until the 19th October, 1931. It was his duty if he desired a further adjournment, to apply at a date sufficiently early to enable him, in the case of a refusal, to be prepared to proceed on the appointed day. In fact, the respondent delayed his application for a further adjournment until the very day appointed for compliance with the order. Even if this could be said to be a case of exercising a judicial discretion, their Lordships can see no ground on the facts of this case for suggesting that it was wrongfully exercised.

There remains for consideration the point whether the assessment can be attacked on the ground that it was not made by the officer to the best of his judgment within the meaning of S. 27. The Judicial Commissioners have laid down two rules which impose upon the officer the duty of (i) conducting some kind of local inquiry before making the assessment under S. 23 (4) and (ii) recording a note of the details and results of such inquiry.

Their Lordships find it impossible to extract these requirements from the language of the Act, which after all is, in such matters, the primary and safest guide. The officer is to make an assessment to the best of his judgment against a person who is in default with regard to supplying information. He must not act dishonestly, or vindictively or capriciously, because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriv-

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ing at a fair and proper estimate; and, although there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary. Their Lordships think that the section places the officer in the position of a person whose decision as to amount is final and subject to no appeal; but whose decision, if it can be shown to have been arrived at without an honest exercise of judgment, may be revised or reviewed by the Commissioner under the powers conferred upon that official by S. 33.

Their Lordships can find no justification in the language of the Act for holding that an assessment made by an officer under S. 23 (4) without conducting a local inquiry and without recording the details and results of that inquiry cannot have been made to the best of his judgment within the meaning of the section. Nor can they find any such justification in the authorities upon which the Judicial Commissioners appear to have relied.

Krishna Kumar v. *The Commissioner*[1] seems to be the foundation of their two "rules." The question referred for decision in that case was in the following words:—"The Income-tax Officer simply puts 'Business. Rs. 30,000.' No basis or details are apparent. Can this be an assessment to the best of one's judgment?" The Court simply answered "yes." This, as a decision, does not seem to afford any basis for the rules. But the Judicial Commissioners refer to the fact that the Commissioner stated in his case that the officer had made a local inquiry and had recorded a note of the details and results of his inquiry, and say that "it is apparent that the answer would have been in the negative if the Income-tax Officer had made no local inquiry and not placed a detailed note thereof on the record in support of the assessment."

Their Lordships can find no justification for attributing this view to the High Court in that case. Indeed, the Judicial Commissioners in the present case seem to treat the matter as decided, not by the view of the High Court, but rather by the opinion of the Commissioner for Income-tax; for they use the following language:

While the aforesaid remarks of the Commissioner of Income-tax, Bengal, impliedly concede that "local enquiry" and the placing on record of a note of the results of such enquiry are essential in law to sustain an *ex parte* assessment the learned Commissioner of Income-tax of these provinces thinks otherwise, presumably on certain observations in *Abdul Bari Chowdhury's*

1. (1931) 5 I.T.C. 295.

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case[1] which go so far as to lay down that an *ex parte* assessment may as well be made on "mere guess" of the Income-tax Officer who is "the *persona designata* to make the assessment" and against whose order "no appeal lies". With due deference we hesitate to subscribe to such a widely stated proposition, as it is extremely likely to lead to certain abuse of the powers by the Income-tax Officers in the discharge of their duties which must be performed throughout in conformity with the rules of justice, equity and good conscience.

The other authorities cited by the Judicial Commissioners do no more, their Lordships think, than affirm that the officer must exercise judgment and must not act on mere caprice, or in any other way inconsistent with the exercise of judgment.

Their Lordships find themselves in agreement with the views expressed by the High Court at Rangoon in the case of *Abdul Bari Chowdhury* v. *Commissioner of Income-tax, Burma*[1].

Their Lordships are of opinion that the assessment must stand and that, on the reference, points (ii), (iii) and (vi) should (if answered at all) have been answered in the negative, and points (v) and (vii) should (if answered at all) have been answered in the affirmative, and that the respondent should have been ordered to pay the costs of the reference. This appeal should succeed, and the order under appeal should be amended as indicated above, and their Lordships will humbly advise His Majesty accordingly. The respondent will pay the costs of the appeal.

Solicitors for Appellant: *The Solicitor, India Office.*

Respondent not represented.

R. C. C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Kandaswami Mudaliar .. *Appellant** (*Defendant*)

v.

Thevammal .. *Respondent* (*Plaintiff*).

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Limitation Act (IX of 1908), S. 20 (1)—Promissory note executed in favour of creditor towards a portion of interest—Nothing on the face of the note to indicate it—Evidence whether can be supplied—Proviso to S. 20 whether it requires specific mention of the particular debt which is paid off by payment.

According to the plain language of the proviso to S. 20, Limitation Act, what is required is acknowledgment of 'payment'. Whether the said payment is payment towards interest as such or principal can be proved by other evidence. If the scheme of the Act is taken into consideration, it does not appear to be the intention of the legislature that the writing evidencing the payment should also indicate that the payment is towards interest or principal. If it

1. (1931) I.L.R. 9 Rang. 281 (F.B.).

* S. A. No. 443 of 1932. 20th March, 1936.

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was intended that the writing also should specify that the payment was towards interest or principal of a debt, S. 20 is superfluous as the writing will operate as an acknowledgment under S. 19 of the Limitation Act. The writing need not specify that the payment was made towards interest or principal.

Where a promissory note was executed by the debtor in favour of his creditor and it was alleged by the creditor that it was towards a portion of interest on his debt due under the previous note in his favour and it was found concurrently by the lower Courts that the later note, though it contained nothing to indicate towards what debt it was executed, could be only towards interest and hence the suit claim was not barred by limitation in second appeal.

Held, that evidence could always be given that the payment was made towards a particular debt, and hence taking the view of the Courts below that the payment was made towards interest due under the earlier note, the suit claim was not barred by limitation.

Case-law discussed.

Appeal against the decree of the District Court of Coimbatore in A. S. No. 162 of 1931, preferred against the decree of the Court of the District Munsif of Erode in O. S. No. 16 of 1930.

K. Periaswami Gounder for Appellant.

C. V. Subramania Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The suit is upon a promissory note dated 27th June, 1923. The question is whether it is barred by limitation. On the 27th March, 1926, a payment of Rs. 85 towards interest was made on the back of the note and on the 23rd July, 1928, a promissory note (Ex. B) was executed in favour of the plaintiff for Rs. 200. It is alleged by the plaintiff that the said promissory note was towards a portion of the interest due under Ex. A. It has been found concurrently by both the lower Courts that the said promissory note was executed only towards interest due under Ex. A and therefore the suit claim is not barred by limitation and decreed the plaintiff's claim. In second appeal it is contended for the defendant that the view of the lower Courts is wrong. It is urged before me by Mr. Periasami Gounder that the suit promissory note, Ex. B, does not refer to the suit debt at all but purports to be for cash received and that it does not appear from the note that the said sum of Rs. 200 was paid towards interest and therefore the conditions of S. 20 are not fulfilled. Payment may be made in any form and a promissory note can be given by way of payment. Under the proviso to S. 20 before a payment by way of interest or principal can save limitation it is essential that the acknowledgment of the payment appears in the handwriting of or in a writing signed by

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the person making the payment. Does the said pro-note operate as an acknowledgment of payment of interest? Before the amendment of the present Limitation Act, so far as the payment of interest is concerned, it need not have been evidenced by writing, but it is only in the case of part-payment of principal, the fact must appear in the handwriting of the person making the payment. But this distinction has now been abolished. Before the amendment in the case of the part payment of the principal, there has been a conflict of opinion in this High Court as regards the conditions necessary for the fulfilment of the proviso. In *Ankamma* v. *Rama*[1], Innes and Kernan, JJ., held:

" All that is required by S. 20 of the Limitation Act of 1877 is that the facts of the payment should appear in the handwriting of the person making the same. It is not necessary that the appropriation of the payment to principal should appear in writing. That may be made to appear otherwise."

But in *Mackenzie* v. *Thiruvengadathan*[2] a different view was taken. In that case Muthuswamy Aiyar and Brandt, JJ., observed:

" There is, no doubt, some parole evidence as to the payment, but the Act requires that the fact of payment, and that such payment was a part-payment, should appear in writing signed by the debtor or his agent authorised to make the payment."

But the decision in *Ankamma* v. *Rama*[1] was not noticed in this case. In *Muthiah Chettiar* v. *Kuttayan Chetty*[3] the part-payment was by means of a hundi, just as it was by means of a promissory note in this case, and Abdur Rahim and Oldfield, JJ., held that it would not satisfy the requirements of S. 20 of the Limitation Act as the hundi did not indicate that the payment made by means of the hundi was towards part-payment of the debt. The learned Judges observed:

" On this point, there is a decision of this High Court reported in *Mackenzi* v. *Thiruvengadathan*[2] of Muthuswamy Aiyar and Brandt, JJ., confirming the judgment of Parker, J., to the effect that the writing must show that the payment was made towards the debt in question and this seems to us to be the interpretation warranted by the language of the proviso, which speaks of the payment, referring apparently to part-payment of the principal of the debt; that is to say, there must appear in the payee's writing an endorsement that the payment was in the nature of and intended to be part-payment of the principal."

And they prefer to follow *Mackenzie* v. *Thiruvengadathan*[2] in preference to in *Ankamma* v. *Rama*[1], *Soumia Narayana Aiyangar* v. *Alagirisami Aiyangar*[4] a payment of Rs. 700 was

1. (1883) I.L.R. 6 Mad. 281.
2. (1886) I.L.R. 9 Mad. 271.
3. (1917) 6 L.W. 790.
4. (1912) M.W.N. 754: 11 M.L.T. 429.

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made towards three promissory notes, but it does not appear whether it was made towards the principal or interest, or principal and interest of all or any, and if so which, of the pronotes sued on. The finding returned was that Rs. 700 was paid towards the amount due under the pronotes sued on but that there was nothing to show whether the payment was towards principal only or towards principal and interest. The learned Judges, Abdur Rahim and Sundara Aiyar, JJ., held:

> " The payment was towards the discharge of the debt due under the three promissory notes. It must be either that the interest was intended to be discharged or the principal, or principal and interest both. If the payment was towards interest, no writing is necessary, and mere payment will be sufficient to save limitation. . . . . . . If it was towards principal, then in that case there is the entry in the handwriting of the man who made it and that satisfies the requirements of S. 20."

This decision seems clearly to indicate that it need not appear in writing that the payment was towards part-payment. This view is in direct conflict with the view expressed both in *Mackenzie* v. *Thiruvengadathan*[1] and *Muthiah Chettiar* v. *Kuttayan Chetty*[2] but none of these two decisions are noticed in the above judgment though Abdur Rahim, J., was a party to *Muthiah Chettiar* v. *Kuttayan Chetty*[2], Kumaraswamy Sastri, J., has followed the decision in *Soumia Narayana Aiyangar* v. *Alagirisami Aiyangar*[3] in *Sankaram Aiyar* v. *Thiraviya Nadan*[4]. I find also that the decision in *Soumia Narayana Aiyangar* v. *Alagirisami Aiyangar*[3] was cited with approval by Varadachariar and Burn, JJ., in *Lakshmi Naidu* v. *Gunnamma*[5] where the earned Judges observed:

> " Where the payment is evidenced by a writing which is signed by the person making the payment, it makes no difference whether the payment is held to be for interest or for principal or for both".

In *Ambrose Summers, an Insolvent,* In re,[6] the decision in *Ankamma* v. *Rama*[7] was followed by Sale, J. The ground on which he rested his decision was that there is a difference in the language in regard to payment of interest and principal in the section, that the payment of interest must be 'as such' whereas the part-payment of principal need not be 'as such'. In *Kedar Nath Mitra* v. *Dinabandhu Saha*[8], Jenkins, C. J., seems to be inclined to the view expressed in *Ankamma* v. *Rama*[7] and held if a cheque be delivered and received as such

1. (1886) I.L.R. 9 Mad. 271.
2. (1917) 6 L.W. 790.
3. (1912) M.W.N. 754: 11 M.L.T. 429.
4. (1919) 51 I.C. 240.
5. (1934) 68 M.L.J. 470 at 475: I.L.R. 58 M. 418.
6. (1896) I.L.R 23 Cal. 592 at 599.
7. (1883) I.L.R. 6 Mad. 281.
8. (1915) I.L.R. 42 Cal. 1043.

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by the payee it would satisfy the provisions of S. 20 as the fact of payment is evidenced by the writing of the debtor. *Hem Chandra Biswas* v. *Purna Chandra Mukherji*[1] has taken a similar view. The decision in *Sakharam Manchand* v. *Keval Padamsi*[2], follows the decision in *Ankamma* v. *Rama*[3] and emphasises the absence of the words 'as such' in the section in relation to the part-payment of principal. Shah, J., observes:

"All that is necessary, in my opinion, for the creditor to prove in such a case is that the fact of the payment appears in the handwriting of the person making the same and further that the payment is really in part satisfaction of the principal of a debt. If these two facts are established, the creditor is entitled to have the benefit of the saving provisions of S. 20 on the question of limitation".

The decision in *M. B. Singh & Co.* v. *Sircar & Co.*[4] also dissents from the view taken in *Mackenzie* v. *Thiruvengadathan*[5] but that decision like the one in *Ambrose Summers, an Insolvent,* In re[6], lays stress on the absence of the words 'as such' in the proviso with reference to part-payment of the principal. No doubt all these decisions relate to the construction of the proviso with reference to part-payment of principal before the Limitation Act was amended but the amendment now makes no distinction between the payment towards interest or payment towards principal except the change in the language by substituting 'acknowledgment' in the place of 'the fact' and the acknowledgment need not necessarily be in the handwriting of the person making the payment. It is enough if it appears over his signature. There is a recent decision of the Lahore High Court in *Jagtu Mal* v. *Charanji Lal*[7] wherein Jai Lal, J., considers the question, agree with the view expressed in *Kedar Nath Mitra* v. *Dinabandhu Saha*[8] and *M. B. Singh & Co.* v. *Sircar & Co.*[4] and dissents from the view taken in *Mackenzie* v. *Thiruvengadathan*[5] and in regard to the amendment he makes the following observation at page 583:

"In my opinion the amendment of the proviso has been made in favour of the creditor who is now able to prove the writing of the debtor not only relating to the actual fact of the payment but also to the acknowledgment of the fact of payment".

The question now is, does the proviso require that the writing itself must indicate that the payment was made towards interest or principal? According to the plain language

1. (1916) I.L.R. 44 Cal. 567.
2. (1919) I.L.R. 44 Bom. 392.
3. (1883) I.L.R. 6 Mad. 281.
4. (1929) I.L.R. 52 All. 459.
5. (1886) I.L.R. 9 Mad. 271.
6. (1896) I.L.R. 23 Cal. 592 at 599.
7. (1933) I.L.R. 14 Lah. 580.
8. (1915) I.L.R. 42 Cal. 1043.

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of the proviso what is required is acknowledgment of 'payment'. Whether the said payment is payment towards interest as such or principal can be proved by other evidence. So far as part-payment of principal is concerned, as I have already shown before the amendment the preponderance of judicial opinion has been towards the view that the writing need not show that payment was towards principal and this in my opinion is the sounder view. The amendment has not made any alteration in the law. The question is if the payment was made towards interest, should the writing show that the payment was made towards interest. I do not think the legislature intended to make any differentiation regarding interest. No doubt evidence will have to be given according to one view, which expresses again the preponderance of judicial opinion in this respect, that the payment was made towards interest as such though according to another view a payment on general account might be treated as payment of interest as such. But any way the payment must be towards interest as such according to the plain language of S. 20 (1). If the scheme of the Act is taken into consideration, it does not appear to be the intention of the legislature that the writing evidencing the payment should also indicate that the payment is towards interest or principal. S. 19 deals with an acknowledgment of liability as such in respect of any property or right or debt. S. 20 is intended to provide by way of statutory declaration that from the fact of payment of interest or part-payment of principal of a debt you can imply acknowledgment of liability in respect of the debt. If it was intended that the writing also should specify that the payment was towards interest or principal of a debt, S. 20 is superfluous as the writing will operate as an acknowledgment under S. 19 of the Limitation Act. I am therefore of opinion that the writing need not specify that the payment was made towards interest or principal. That any payment was made towards a particular debt evidence can always be given. Both the courts have concurrently found in this case that the promissory note (Ex. B) was executed towards interest as such on the suit note (Ex. A). Therefore the suit claim is not barred by limitation. In the result the second appeal fails and is dismissed with costs. Leave granted.

K. C. —— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE HORWILL.

Athappa Goundan .. *Prisoner* (1st Accused).*

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Evidence Act (I of 1872), Ss. 27 and 30—Confessional statement made by accused—Information given to Police Officer—Discovery of material objects —Admissibility of statement in evidence—Connection between discovery of objects and statement—Confession made by one co-accused—Admissibility as against another—Statements under S. 27, Evidence Act—Mode of recording by Police Officers.

Before a statement of an accused person is admitted in evidence under S. 27 of the Evidence Act it must be shown that the fact discovered is a relevant fact and that the object is a material object. The fact deposed to and the fact discovered obviously must be relevant, and the fact or thing discovered can be relevant only if it is connected with the offence of which the accused is charged; and the confession in the section is a confession of the offence charged and not of anything else. In cases where the things discovered as a result of the accused's information are proved to be the subject of the charge or worn by the victim of a murder, just before the murder is committed, the property so discovered is directly connected with the crime and the fact thereby discovered is relevant. It can be made relevant by evidence *aliunde* or by the statement of the accused himself.

Accused one to three were charged and convicted for having murdered the father of the third accused by strangling him. It was stated that the deceased and the third accused were quarrelling because of the frequency of the first accused's visit to the third accused. The second accused was an associate of the first accused. The evidence consisted among other things of a statement made by the first accused recorded by the Police Officer two days after the occurrence, which was to the following effect: "He said that at about 11 P.M., on the night of 26-3-1936, himself and Gurunatha Goundan, son of Kanda Goundan of Erangattur, together killed Sennimalai Goundan *alias* Sottayan by gagging his mouth with cloth, and throttling his neck with hands and also by putting a rope and pressing it,......that that night......they got two bottles of illicit arrack by paying Rs. 2 to Gandhi Ranga Royan of Kallipatti who got it from some other place . . . that a small quantity was left over in one bottle only that (they) buried (1) the empty bottle, (2) a rope and cloth gag in a dung hill next to the cattle-shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallipatti and that he would go and take them and produce them. This is known to us". Subsequently the Sub-Inspector took the first accused together with the Village Munsif to the dung hill and the accused took a rope, a cloth and an empty bottle. After making the statement the first accused took the Sub-Inspector to the compound of the chatram and from near a log of wood dug up and produced another empty bottle. The question

*R. T. No. 4 of 1937. 16th March, 1937.
Crl. Appl. Nos. 729 and 730 of 1936.

having been raised whether the statement made by the first accused was admissible in evidence,

Held, that the following part of the confessional statement was admissible in evidence as against the first accused under S. 27 of the Evidence Act: "He stated that at about 11 o'clock in the night of 26th March, 1936, he and Gurunatha Goundan, son of Erungattur Kanda Goundan, together murdered the deceased Sottayan *alias* Sennimalai Goundan by gagging his mouth with cloth by pressing him with rope . . . that that night. . . . they got two bottles of illicit arrack . . . that a small quantity was left over in one bottle only . . . After, (1) the empty bottle, (2) a rope and the cloth which was used for gagging the mouth have been buried in cowdung pond adjoining the cattle-shed in the compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallipatti and that he would go there, take them out and give".

Held, further, that the confessional statement made by the first accused which was admissible against him was also admissible in evidence against the second accused under S. 30 of the Evidence Act.

Case-law reviewed and discussed.

Statements made by an accused which are or may be provable under S. 27 of the Evidence Act should be clearly and carefully recorded by the Police Officers concerned. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased. With such a record of the statement before him it will then be for the trial Judge to decide how much of it is admissible under the section.

Trial referred by the Court of Session of the Coimbatore Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 72 of the Calendar for 1936 on 25th November, 1936.

The case came up in the first instance before Mockett and Horwill, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The three accused have been convicted of the murder of Sennimalai Goundan, the father of the third accused, by strangling him. The first accused has been sentenced to death and the second and third accused to transportation for life.

The third accused is the wife of P.W. 13. These two lived with the deceased till about a year prior to the latter's death when P.W. 13 left the house because he says the deceased and himself quarrelled. The third accused remained with her father the deceased. P.W. 13 was declared to be a hostile witness at the trial but there is other evidence that P.W. 13 left the house because of the third accused's intimacy with the first accused. It is also stated that the deceased and the third accused were quarrelling because of the frequency of the first accused's visit to the third accused. The second accused is an associate of the first accused. On the morning of the 26th March, 1936, it is in evidence for the prosecution that the third accused was heard to cry out that her

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father was dead. A number of prosecution witnesses thereupon went to the deceased's house. The preponderance of the evidence is that the deceased was lying dead in or near the thatched house closely adjoining the deceased's tiled house. The exact position of his body is not material for the purpose of this reference but a consideration of that aspect of the matter may be material for a decision on the facts. The medical evidence is quite definite that the deceased had been strangled. An inquest was held on the 27th March, from 6 to 9 P.M. and it was then that the witnesses for the prosecution were examined by the investigating officer. The prosecution witnesses with the exception of P.W. 13 who as stated above has been declared to be hostile agree that no explanation for the death of the deceased was suggested by the third accused. At the sessions, but not before the Magistrate, the third accused stated that when she woke up she found her father hanging by a rope, that she raised an outcry, that the neighbours came and cut the rope, laid her father on the cot and carried the corpse to the thatched shed. There is no evidence for the prosecution supporting this belated statement. The medical evidence on the contrary is emphatic that the deceased died by strangulation and not by hanging. The evidence for the prosecution may be placed in the following categories:—(1) the unfriendly relations between the deceased and the third accused over the latter's friendship with the first accused and there is further evidence that the third accused was anxious lest the deceased should transfer his property to a third person, (2) that on the night preceding the morning on which the body was discovered the first and second accused were seen to go to the house of the deceased and were admitted by the third accused. This was at about " Pattial time ". They were later seen by several witnesses whispering together in the deceased's compound where the deceased was sleeping on a cot. Later that evening the first and second accused were seen to leave the compound, the first accused carrying a bottle of toddy and both intoxicated, and (3) on the 29th at 6 A.M. it is in evidence that the 1st accused made a statement the purport of which is stated in Ex. C. "He said that at about 11 P.M. on the night of 26th March, 1936, himself and Gurunatha Goundan, son of Kanda Goundan of Erangattur, together killed Sennimalai Goundan *alias* Sottayan by gagging his mouth with cloth and throttling his neck with hands and also by putting a rope and pressing it, . . . that that night. . . they got two bottles of illicit arrack by paying Rs. 2 to Gandhi Ranga Royan of Kallipatti who got it from some other place . . . that a small quantity was left over in in one bottle only that (they) buried (1) the empty bottle, (2) a rope and cloth gag in a dung hill next to the cattle-shed in the same compound

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and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallipatti and that he would go and take them and produce them. This is known to us". Subsequently the Sub-Inspector took the first accused together with the Village Munsiff P.W. 15 to the dung hill and the accused took M. O. I a rope, M. O. VI a cloth and M. O. VII an empty bottle. The first accused then took the Sub-Inspector to the compound of the Chatram and from near a log of wood dug up and produced M. O. VII-a another empty bottle.

From the above it will be seen that the admissibility in evidence of the statement in Ex. G is of the utmost importance in this case. Mr. C. Chandrasekhara Sastri for the accused has argued that the only portion of this statement admissible in evidence is the portion beginning with the words "they buried (1) the empty bottle" to the end. The Public Prosecutor has contended that the whole of this statement is admissible under S. 27 of the Indian Evidence Act. Many authorities have been cited before us from which it is evident that the position is far from clear in this Presidency. *Queen-Empress* v. *Commer Sahib*[1] is relied on as authority in support of his contention. We may however observe that the matter is very shortly discussed in that case. *Sogaimuthu Padayachi* v. *King-Emperor*[2] a judgment of Spencer, Offg. Chief Justice, given on a difference of opinion between Devadoss and Wallace, JJ., does not appear to be in accord with *Queen-Empress* v. *Commer Sahib*[1]. The matter has been fully discussed in a decision of a Bench of this High Court (Beasley, C.J. and Sundaram Chetty, J.) Cr. A. No. 38 of 1931, R. T. No. 11 of 1931. In that case the learned Judges appear to be in complete accord with *Sogaimuthu Padayachi* v. *King-Emperor*[2] especially with regard to the following observations of Spencer, O.C.J., at page 295:

"But if the accused did use the words, then, they are parts of the sentence in which he gave information which led to the discovery of stolen property, and parts of sentences cannot be excluded so as to have the effect of making the whole statement incomplete and less intelligible."

The learned Judges lay down principles in this case which are in agreement with *Sogaimuthu Padayachi* v. *King-Emperor*[2] but in the result the Court decided that the confessional statement "I have thrown into the Panayadi Oorni the aruval with which I cut Seethai. I have buried in the hollow of a cut palmyra tree the ornaments which took from her body", should be admitted eliminating the statement that it was the aruval with which Seethai was cut and that the ornaments were those which he took from her body. It will thus be seen that in Madras there appears to be a definite variance in opinion—or at

1. (1888) I.L.R. 12 Mad. 153. 2. (1925) I.L.R. 50 Mad. 274.

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least considerable uncertainty—as to the admissibility of statements under S. 27. In other presidencies it will be seen from the case-law that opinion is by no means uniform. For instance *Sukhan* v. *The Crown*[1] (a Bench of seven Judges) and *Amiruddin Ahmed* v. *Emperor*[2] are directly opposed to (1) *Queen-Empress* v. *Babu Lal*[3] and (2) *Lalji Dusadh* v. *King-Emperor*[4]. The Bombay view appears to be in agreement with Lahore and Calcutta (see *Ganu Chandra* v. *Emperor*[5]). *Mt. Jamunia Partab Lohar* v. *Emperor*[6] follows *Sogaimuthu Padayachi* v. *King-Emperor*[7].

The result of this position has become obvious for sometime past in the handling of statements under S. 27 of the Indian Evidence Act by the Sessions Courts of this Presidency. With certain exceptions there appear to be broadly speaking two schools of thought—

(1) to exclude any statement at all but to record merely the fact that the accused showed the articles to the police, or

(2) to record that the accused stated that the articles was in a certain place, for example, " I have put the aruval in the well".

This procedure appears to be due to a commonly held view that the information in consequence of which the incriminating fact has been discovered must be limited to so much as would enable the police to find the incriminating object. Forbes, J., in his dissenting judgment in *Sukhan* v. *The Crown*[1] comments on this position. In view of the importance of the question which has arisen we have not heard full arguments as to the admissibility of the above statement and have not decided it but instead refer it to a Full Bench.

A further point of law has arisen in this case on which an authoritative ruling is most desirable. It will be observed that in the statement made by the first accused he implicates the second accused. It has been argued that a confession under S. 27 is not a confession such as is contemplated by S. 30 of the Indian Evidence Act and cannot be taken into consideration against the second accused. We accordingly refer the following matters to a Full Bench:—

(1) Is the whole or any part of the following statement: "He said that at about 11 P.M. on the night of 26th March, 1936, himself and Gurunatha Goundan, son of Kanda Goundan of Erangattur, together killed Sennimalai Goundan *alias* Sottayan by gagging his mouth with cloth and throttling his neck with hands

1. (1929) I.L.R. 10 Lah. 283 at 303 (F.B.).
2. (1917) I.L.R. 45 Cal. 557.
3. (1884) I.L.R. 6 All. 509 (F.B.).
4. (1927) I.L.R. 6 Pat. 747.
5. (1931) I.L.R. 56 Bom. 172.
6. A.I.R. 1936 Nag. 200.
7. (1925) I.L.R. 50 Mad. 274.

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and also by putting a rope and pressing it,....that that night,.... they got two bottles of illicit arrack by paying Rs. 2 to Gandhi Ranga Royan of Kallipatti who got it from some other place,.... that a small quantity was left over in one bottle only, that.... (they) buried (1) the empty bottle, (2) a rope and the cloth gag in a dung hill next to the cattle-shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallipatti and that he would go and take them and produce them. This is known to us" alleged to have been made by the first accused admissible against the first accused under S. 27 of the Indian Evidence Act and if yes how much of it, and

(2) If the answer to No. (1) is in the affirmative, can such statement or any part thereof be "taken into account" against the second accused under S. 30 of the Indian Evidence Act?

We may add that it will be seen from Ex. G that certain parts have been excised by the learned trial Judge on the ground of inadmissibility and it has not been argued before us that such statements are now admissible. We have however directed that in order that the Full Bench before whom this matter comes may have the opportunity of giving the fullest consideration to this matter the whole of Ex. G shall be typed and added to the record to be placed before the Bench.

On this reference the matter came up before a Full Bench as constituted above.

G. Chandrasekhara Sastri for 1st Accused.

N. Somasundaram for Accused 2 and 3.

Parakat Govinda Menon for *The Public Prosecutor* (*L. H. Bewes*) on behalf of the Crown.

The Court expressed the following

OPINION. *The Chief Justice.*—The following questions have been referred to the Full Bench, namely:— Beasley, C.J.

(1) Is the whole or any part of the following statement:

"He said that at about 11 P.M. on the night of 26th March, 1936, himself and Gurunatha Goundan, son of Kanda Goundan of Erangattur, together killed Sennimalai Goundan *alias* Sottayan by gagging his mouth with cloth and throttling his neck with hands and also by putting a rope and pressing it, ... that that night . . . they got two bottles of illicit arrack by paying Rs. 2 to Gandhi Ranga Royan of Kallipatti who got it from some other place, . . . that a small quantity was left over in one bottle only, that . . . (they) buried (1) the empty bottle, (2) a rope and the cloth gag

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in a dung hill next to the cattle-shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in corner of the compound east of the choultry at Kallipatti and that he would go and take them and produce them. This is known to us"

Alleged to have been made by the first accused—admissible against the first accused under S. 27 of the Indian Evidence Act and if yes how much of it; and

(2) If the answer to No. (1) is in the affirmative, can such statements or any part thereof be "taken into account" against the second accused under S. 30 of the Indian Evidence Act?

In the Order of Reference my learned brothers Mockett and Horwill, JJ., the referring Judges, directed that, in order that the Full Bench could give the fullest consideration to this matter, the whole of Ex. G which sets out the statement made by the first accused should be typed and added to the record to be placed before the Bench. This direction has been carried out and the Court translation of Ex. G where it relates to the cloth buried in the dung hill reads as follows:

" The cloth which was used for gagging the mouth".

The learned Counsel for the appellants agree that that is the correct translation.

The facts of this case are sufficiently stated in the Order of Reference and I will therefore proceed to discuss S. 27 of the Indian Evidence Act which my learned brothers in their Order of Reference correctly say has given rise to opinions which from the case-law are by no means uniform. That section reads as follows:

" Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved".

Divergent opinions have been given by Judges upon how much of statements made by the accused persons in the custody of the police in consequence of which facts are thereby discovered can be proved of which the following may be given as examples, namely, that the accused has buried the weapon with which he cut or stabbed the deceased in a certain place or has stolen property which he has pledged or disposed of with certain persons, or has with the property stolen done something, or has murdered someone and thrown the body into a well, or has buried a weapon, adding with which he stabbed or cut the

deceased. Some judges have taken the view that only such part of the statement as relates to the burial or disposal of the articles can be proved and that the further part that the article had been used by the person for stabbing or cutting, or that the property disposed or pledged, etc., was stolen property must be excluded; other judges have taken the view that the latter statement can also be proved; and the cases directly bearing on this question need very careful examination.

The first of these is *Reg.* v. *Jora Hasji and others*[1] the headnote of which reads as follows:—

> " Under S. 27 of the Indian Evidence Act nor every statement made by a person accused of any offence while in the custody of a police officer, connected with the production or finding of property, is admissible. Those statements only which lead immediately to the discovery of property, and, in so far as they do lead to such discovery, are properly admissible. Whatever be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case, and the connection between it and the statements made must have been such that that statement constituted the information through which the discovery was made, in order to render the statement admissible. Other statements connected with the one thus made evidence, and thus mediately, but not necessarily or directly, connected with the fact discovered, are not admissible".

This headnote is taken bodily from the judgment of West, J., on p. 244. In that case, one Lallu disappeared from his village. On a search being made, a quantity of human bones and two cloths were found in a field within the limits of the village of Baithal and the three accused were sent for by a chief Constable on suspicion. One accused produced a bill-hook and a knife from a field; another accused produced a stick; and the two showed the scene of murder together which was also pointed out the next day by another of the accused. In the statement of the facts of the case the words used by the accused whilst in the custody of the police are not set out and therefore I do not know what they were. West, J., however, gives an instance of a statement a part of which he says would be inadmissible. He says at p. 244:

> " For instance a man says: 'You will find a stick at such and such a place. I killed Rama with it.' A policeman, in such a case, may be allowed to say he went to the place indicated, and found the stick; but any statement as to the confession of murder would be inadmissible. If, instead of 'you will find', the prisoner has said, 'I placed a sword or knife in such a spot', when it was found, that too, though it involved an admission of a particular act on the prisoner's part, is admissible, because it is the informa-

1. (1874) 11 B.H.C.R. 242.

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tion which has directly led to the discovery, and is thus distinctly and independently of any other statement connected with it. But if, besides this, the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statement, as it has not furthered, much less caused, the discovery is not admissible."

Further on he says:

"The effect is that, although ordinarily a confession of an accused while in custody would be wholly excluded, yet if, in the course of such a confession, information leading to the discovery of a relevant fact has been given, so much of the information as distinctly led to this result may be deposed to, though as a whole, the statement would constitute a confession which the preceding sections are intended to exclude."

Next is *Queen-Empress* v. *Babu Lal*[1] a decision of a Full Bench. There, the accused gave information to the police to the effect that they had stolen a cow and a calf and sold them to a particular person at a particular place. As a result of this information the cow and calf were discovered. It was held that only the statement that the accused had sold the cow and calf tó a certain person could be proved under S. 27 but not the statement that the accused had stolen them. But Brodhurst, J., in the course of his judgment expresses his opinion upon the meaning of S. 27 by stating a case where a person was missing and fears were entertained that he had been murdered. The Sub-Inspector on receiving a report about this went to Rampur and on his arrival there and whilst he was standing close to a well one Gobind Kahar came up to him and said, "I give myself up; I am guilty" and then made a voluntary and full confession stating the particulars of the crime and the reason for committing it and concluded by saying:

"The knife with which I committed the murder is, together with the body, in this well".

The well was thereupon searched and the knife and the body with a knife wound through the heart were found. Brodhurst, J., says that the Sub-Inspector when giving evidence in Court as to the discovery of the corpse and the knife was under the provisions of S. 27 of the Act competent to say that he had searched the well and found the body and a knife owing to Gobind Kahar having given the information:

"The knife with which I committed the murder is, together with the body, in this well".

The learned Judge was, it is apparent, taking as an instance an actual case. It seems difficult to reconcile

1. (1884) I.L.R. 6 All. 509 (F.B.).

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Brodhurst, J.'s opinion with the views of the other Judges forming that Full Bench. They excluded the statement of the accused that......they had stolen the cow and the calf. But according to Brodhurst if they had said that the cow and the calf which they stole they sold to Abdul Rahman, the whole of that statement could have been proved and I am unable to see that it can make any difference because they stated first that they had stolen the cow and the calf and then that they had sold them. I will refer to this case again later on. However taking his view, the statement in either shape would have to be admitted. In *Abu Shikdar* v. *Queen-Empress*[1] it was held that S. 27 was not intended to let in a confession generally but only such particular part of it as set the person to whom it was made in motion and led to his ascertaining the fact or facts of which he give evidence. In that case the prisoner's statement was that he had robbed Kristo Rishi of Rs. 48 whereof he had spent Rs. 8 and had Rs. 40. Kristo Rishi was the murdered man. Norris, J., said that no facts deposed to were discovered by that statement of the prisoner but this case is cited by learned Counsel for the first appellant in support of his argument because Norris, J., at p. 641 emphatically endorses the observations of Straight, J., in *Queen-Empress* v. *Babu Lal*[2] to which case reference has already been made where he says:

> "No judicial officer dealing with such provisions should allow one word more to be deposed to by the police officer detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him. S. 27 was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion,and led to his ascertaining the fact or facts of which he gives evidence".

Straight, J.'s observations when applied to the facts of this case are, in my opinion, of greater assistance to the learned Public Prosecutor's argument than the appellant's and I will refer to them again later. The next case is a decision of this High Court which has been relied upon successfully for many years, in support of arguments similar to the appellants', namely, *Queen-Empress* v. *Commer Sahib*[3] a decision of Muthuswami Iyer and Parker, JJ. They state that the reasonable construction of S. 27 is that in addition to the fact

1. (1885) I.L.R. 11 Cal. 635. 2. (1884) I.L.R. 6 All. 509 (F.B.).
3. (1888) I.L.R. 12 Mad. 153.

discovered so much of the information as was the immediate cause of its discovery is legal evidence. The information given by the prisoner in that case was that he had deposited the cloths produced with the witnesses who delivered them up on demand and this information they held was the proximate cause of the discovery of the cloths and was admissible in evidence. The Bench then said:

> "If he had proceeded further and stated that they were cloths which he stole on the day mentioned in the charge from the complainant, that statement would not be evidence, for it would be only introductory to a further act on his part, *viz.*, that of leaving the cloths with the witnesses and on that ground it would not be the immediate cause of or the necessary preliminary to, the fact discovered."

This opinion was clearly *obiter* because the prisoner had not made any such further statement and it was not necessary to consider what would have been the position had he done so. In *Manjunathaya* v. *King-Emperor*[1] I think that Sadasiva Iyer, J., had that case in mind when he stated that he was bound by authority and that but for it he should himself have held that any statement which forms a simple connected narrative leading naturally to the discovery of the stolen property is admissible in evidence and that only statements which are patently irrelevant to the discovery should be excluded. The statement made by the first accused in that case was that he and the second accused stole the missing money and that the stolen money would be found in a heap of rubbish close to the house. In view of what he considered binding authority he held that the earlier part of the statement was inadmissible. Another case is *Queen-Empress* v. *Nana*[2] a Full Bench decision. There the accused was charged with dishonestly receiving stolen property. In the course of the police investigation he was asked by the police where the property was. He replied that he had buried it in the fields. He then took the police to the spot where the property was concealed and with his own hands disinterred the earthern pot in which the property was kept. He made a second statement when pointing out the spot to the effect that he had buried the property there. It was held that his statement that he had buried the property in the fields was admissible in evidence under S. 27 of the Evidence Act as it set the police in motion and led to the discovery of the property and the view taken by

1. (1914) 26 M.L.J. 352. 2. (1889) I.L.R. 14 Bom. 260 (F.B.).

this High Court in *Queen-Empress* v. *Commer Sahib*[1] was followed. The Court ruled out the statement that he had "kept" the property because it was not necessarily connected with the fact discovered. In *Amiruddin Ahmed* v. *Emperor*[2] the prisoners appear to have made long statements although what they said is nowhere stated in the judgment. As a result of the statements facts were discovered. The statements set out the whole history of the investigation and it was held as in the other cases that only the particular information which led to the discovery could be proved and Shamsul Huda, J., observes:

"If therefore an accused person were to state to a police officer that he killed *A* with a knife and concealed the dead body at a particular place, all that is admissible, is that the information that he had concealed the dead body in that place but the further information that he himself had killed *A* is not admissible under S. 27".

Sukhan v. *The Crown*[3] is a decision of a Full Bench of seven Judges. The question there was:

"*A* is being tried under S. 302, Indian Penal Code, for having committed the murder of *B*, who is proved to have suddenly disappeared from his house and whose dead body was recovered from a well two days later. At the time of his disappearance *B* was wearing certain ornaments, but these ornaments were not found on his body at the time of its recovery from the well. During the investigation *A* is alleged to have made a statement to the police in these terms: 'I had removed the *karas*, had pushed the boy into the well and had pledged the *karas* with Allah Din', and in consequence of the information so received the *karas* were recovered from Allah Din, which were identified as those worn by *B* at the time of his disappearance. Is the whole or any part of the aforesaid statement admissible against *A* under S. 27 of the Indian Evidence Act, and if so, how much of it?"

The Full Bench held (Fforde and Jai Lal, JJ.) dissenting that the statement by the accused that he had pledged with Allah Din the *karas* subsequently recovered from the latter was admissible under S. 27 of the Evidence Act, but that the rest of the incriminating statement could not be received in evidence. Shadi Lal, C. J., says that the fact discovered may be the stolen property, the instrument of the crime, the corpse of the person murdered or any other material thing or it may be a material thing in relation to the place or the locality where it is found and that taking the case before them as an illustration the fact discovered was not the *karas simpliciter* but the *karas* being found in the possession of Allah Din and that it was necessary to draw that distinction because the

1. (1888) I.L.R. 12 Mad. 153.
2. (1917) I.L.R. 45 Cal. 557.
3. (1929) I.L.R. 10 Lah. 283 (F.B.).

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amount of the information admissible is limited by the precise fact discovered thereby or in other words the information to be admitted must relate distinctly, not to the *karas*, but to the *karas* in relation to their possession by Allah Din. I must observe that the importance of the last named is that the *karas* in the possession of Allah Din were proved to be the *karas* which the boy was wearing when he was last seen alive. Therefore the information given by the accused that he had pledged them with Allah Din was by itself sufficient to make the subsequent discovery of them in the possession of Allah Din a highly relevant fact and indeed a very damaging one to him. Had the *karas* not been shown to have been those worn by the deceased, then in my view no relevant fact would have been discovered in consequence of the information given by the accused limited to that statement and there would be no connection at all between the *karas* and the offence charged; and this to my mind is a very important point because it appears to me that in every case which has been cited where only such part of the information as relates to the disposal of the articles has been admitted the articles themselves were the stolen articles or cloths or jewels worn by the deceased or the dead body of the victim himself and were thus definitely connected with the offence charged and needed the inclusion of no further matter in the information in order to make them material objects because not only must the information relate distinctly to the fact discovered but the fact discovered must be a relevant fact. Shadi Lal, C. J., agrees that the judgments of the High Courts in India which were cited did not disclose a complete unanimity as to the extent of the information admissible in evidence under S. 27 but he takes the view that the consensus of judicial opinion however is in favour of the view that the section allows only so much of the information as leads directly and immediately to the discovery of a fact but that the portion of the information which merely explains the material thing discovered cannot be proved. In dealing with those opinions he says on page 296:

"Suppose a prisoner on being asked about the weapon of offence says 'I buried a hatchet in my field. I killed *A* with it'. Now, it is indisputable that the recovery of a hatchet from the field renders only the first part of the statement admissible, and that the second part cannot be given in evidence. But if the police officer converts the two sentences into one and represents the accused as saying 'the hatchet with which I killed *A* I buried in my field,' then, according to those judgments, the whole of the above statemen, would be admissible".

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He, however, does not agree that it is. In the course of his judgment he refers to a Madras decision, namely, *Sogaimuthu Padayachi* v. *King-Emperor*[1] where this High Court admitted in evidence the statement of the accused that:

"The properties stolen from the mutt were buried by me and others in the Cauvery Bank".

He expresses the doubt whether the portion of the statement "stolen from the mutt" could be admitted on the strength of the decision in *Queen-Empress* v. *Commer Sahib*[2], already referred to. I will refer to *Sogaimuthu Padayachi* v. *King-Emperor*[1] later on. Both the dissenting Judges Fforde and Jai Lal, JJ., definitely take the opposite view and the reasons stated by them for doing so, with all respect to the other members of the Full Bench seem to me to be correct. Fforde, J., says that the fact that is the "thing" must be connected with the crime in question in order to come within the rule of relevancy laid down in S. 5 of the Act; and this is in my view obviously correct and no one has disputed that the fact must be a relevant fact. He observes quite rightly that in all the cases which have come before the Courts the "fact discovered" has been the body of the murdered person, the instrument of the crime, the spoils of the robbery or some other incriminating object connected with the crime under consideration and that it follows that before a confessional statement made by a person accused of an offence who is in the custody of a police officer may be proved against him two conditions must be observed, firstly, that some incriminating things must be proved to have been found as the direct result of the information supplied by the accused and, secondly, it must be confined to that portion which refers exclusively to the thing found and that the rule may be expressed in this way; when any incriminating object is proved to have been found as the result of information given by a person accused of any offence in the custody of a police officer that portion of the information which has led to the object being found may be proved—provided it refers clearly to that object, even though the information provable is self-incriminating. On page 304, Fforde, J., says:

"What is it which sets the police in motion and leads to the discovery of property? Usually it is the statement by the accused that he has hidden in some place some object connected with the crime. Take an actual case. The

1. (1925) I.L.R. 50 Mad. 274. 2. (1888) I.L.R. 12 Mad. 153.

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accused says 'the *chhavi* with which I killed *A* is hidden under a heap of manure in my *haveli*'. What part of this information must be deemed to have set the police in motion and led to the finding of the *chhavi*? Surely, not merely the words 'the *chhavi* under a heap of manure in my *haveli*'. By themselves those words would be meaningless. They would hardly be likely to set the police in motion. Is it not the connection of the *chhavi* with the murder under investigation which set the police in motion and led to the discovery? If the words ' with which I killed *A* ' can in this sense be said to have led to the discovery of the *chhavi*, then the whole of that piece of information may be proved—though it amounts to a confession, as the words certainly relate distinctly to the fact discovered, *i.e.*, to the *chhavi*".

He refers to *Sogaimuthu Padayachi* v. *King-Emperor*[1] and agrees with the opinion of Spencer and Devadoss, JJ. Jai Lal, J., in his judgment on page 324 makes observations also with which I entirely agree, *viz.*:

"I will put the case in another form. The object of the prosecution in proving the information is to show, not that a certain thing was found in a particular place, but that the accused had the knowledge, invariably guilty knowledge, and in some cases possession, of a thing which was connected with the crime. The location of the thing is not so very material. It may be with *A*, *B* or *C* or may be in one place or the other. The important considera-tion is always the thing discovered and its connection with the crime. Divorced from the thing, therefore, the information becomes both useless and irrelevant. I will illustrate what I mean by giving an instance; supposing the prosecution merely proves that a certain thing was found in a particular place as a result of information supplied by the accused but fails to prove the connection of the thing so discovered with the crime, is the evidence relevant in the case? I think not. The attempt of the prosecution, therefore, always is to establish the connection of the thing discovered with the crime and therefore it is necessary for them to prove as a first step that the particular thing was discovered as a result of the information and then to prove its connection with the crime".

Another way of looking at the same topic is this. Supposing the witness in one case says:

"As a result of information given by accused I recovered some *karas* from Allah Din".

And in another case he says:

"As a result of information given by the accused I recovered *karas* which the deceased had on his person when he was last seen alive".

Which of these two statements is relevant to the case? I have no hesitation in saying that it is the last statement which is relevant or has any bearing on the case. It is therefore not so much the reference to the place where certain property is found that is the important part of the information but it is the incriminating thing recovered on which stress is always laid. Without a description of the thing discovered or its

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1. (1925) I.L.R. 50 Mad. 274.

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connection with the crime, whether this is done by means of the statement of the accused or by other evidence, the information is of no value and in practice the police never bothers to discover the thing unless the accused by his statement has connected it with the crime. What has therefore led to the discovery of the article is the information about its connection with the crime and its location.

Before dealing with *Sogaimuthu Padayachi* v. *King-Emperor*[1], *Manjunathaya* v. *King-Emperor*[2] and In re *Periakaruppan*[3], I must refer to another decision of the Bombay High Court, a decision of the Calcutta High Court and a decision of the Patna High Court which support the appellants' contention. The first case is *Ganu Chandra* v. *Emperor*[4]. There each of the accused gave information to the police that he would point out the place where his share of the property stolen in a dacoity case was buried and offered to produce the same. The Court held that the words "his share of the property" and "stolen in the Dahiwadi dacoity" must be excluded on the ground that they were not necessarily connected with and did not distinctly relate to the discovery of the property. Therefore the only part of the information admitted was that the accused would point out the places where the property was buried and that they offered to produce the same. *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Bhajoo Majhi*[5] is to the same effect. In *Sonaram Mahton* v. *King-Emperor*[6] the person who was accused of murder made a statement to the effect that he and two others had hid the corpse of the victim in a mine into which they had descended by means of a wire rope hanging from a palas tree at the entrance to the incline and in consequence of the information so received the body and clothes of the deceased were discovered. It was held that the whole of the statement that the prisoner himself had put the body into the incline was receivable in evidence under S. 27 of the Evidence Act. There was no statement by the prisoner that the body was that of a man murdered by him or that he had murdered the man and hidden the corpse in the mine. Since it is generally accepted by all High Courts that the statement of the accused that he hid or buried mate-

1. (1925) I.L.R. 50 Mad. 274.
2. (1914) 26 M.L.J. 352.
3. (1931) R. T. No. 11 of 1931.
4. (1931) I.L.R. 56 Bom. 172.
5. (1929) 34 C.W.N. 106.
6. (1930) I.L.R. 10 Pat. 153.

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rial objects is admissible under S. 27 where the material objects are discovered in consequence of his statement and it is not contested here by the appellants that such a statement is admissible. This case is not of much assistance but *Sukhan* v. *The Crown*[1] is quoted with approval in the judgment and to that extent it does support the appellants' case: though Scroope, J., on p. 159 does say:

"On the other hand, we cannot garble the statement made to the police so as to render it absolutely innocuous to the prisoner and remove it entirely from the nature of a confessional statement".

I now come to the Madras cases. I have already referred to *Queen-Empress* v. *Commer Sahib*[2] and also to *Manjunathaya* v. *King-Emperor*[3] where Sadasiva Aiyar, J., clearly expresses a view contrary to that in *Queen-Empress* v. *Commer Sahib*[2] and would admit a statement by the accused:

"I committed this theft and I have concealed the stolen property in such and such a place but in view of binding authority he is forced to hold otherwise. He did however admit "that portion signifying that the property stolen from the *dabbi* about which the police were then making an investigation will be found in the rubbish heap".

Then there is the recent case of *Sogaimuthu Padayachi* v. *King-Emperor*[4] which was decided by Spencer, O.C.J., on a difference of opinion between Devadoss and Wallace, JJ. He held agreeing with Devadoss, J., that if an accused makes a statement under S. 27 of the Indian Evidence Act the whole of the statement which leads to the discovery of the stolen article is admissible and it should not be cut up so as to confine it only to the actual words which the accused may use to express the fact that he had hidden the properties. Wallace, J., took the contrary view and held that only the statement by the accused that he had hidden the properties should be admitted. The accused in that case were charged with murder under S. 302, Indian Penal Code, and the information given by the accused was that:

"The properties stolen from the mutt were buried by me and others in the Cauvery bank".

The case for the Crown was that this property was worn by or on the person of the victim who was the thambiran of the mutt. The part of the statement in controversy was "stolen from the mutt". Devadoss, J., in his judgment cites a number of decisions bearing on the point and subjects them

1. (1929) I.L.R. 10 Lah. 283 (F.B.). 2. (1888) I.L.R. 12 Mad. 153.
3. (1914) 26 M.L.J. 352. 4. (1925) I.L.R. 50 Mad. 274.

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to a very careful examination and amongst others refers to the observations of Brodhurst, J., in *Queen-Empress* v. *Babu Lal*[1] stating on p. 281.

As mentioned by Brodhurst, J., in *Queen-Empress* v. *Babu Lal*[1] if the accused says:

> "The revolver with which I shot the deceased is in this well."

Can it be said that that statement is inadmissible? If the accused says:

> "I have hidden the stolen properties in this place the whole statement must be taken together. If he does not make statement that the properties are stolen there is no confession at all. S. 27 of the Evidence Act does contemplate a confession".

The appellants' contention in that case was that the statement of the accused that the properties were in a particular place was admissible but that any statement which carried an explanation as to how the properties came to be there was inadmissible in evidence as well as the statement that they were stolen properties, in other words, only the statement that the property was buried in the Cauvery bank was admissible, and reliance was placed upon *Queen-Empress* v. *Commer Sahib*[2] and the Full Bench decision in *Queen-Empress* v. *Babu Lal*[1]. Neither of these cases however supported the appellants' contention there that the statement that the accused had buried the articles was not receivable in evidence though certainly they supported the contention that the statement that the articles was stolen must be excluded. Spencer, J., in his judgment adheres to the view expressed by him In re *Nainamalai Konan*[3] that:

> "The statement of an accused that he had in his possession certain stolen property is admissible in evidence even though he himself produced the property."

Upon this point he agrees with Devadoss, J., and he also agreed that if an accused makes a statement which is admissible under S. 27, the whole of the statement which leads to the discovery of the stolen property is admissible and that evidence should not be cut up so as to reduce the statements only to the actual words which the accused may use to express the fact that he has hidden the properties. The opinion of Devadoss, J., was quoted with approval by Fforde, J., in *Sukhan* v. *The Crown*[4]. Next there is the case cited by my learned

1. (1884) I.L.R. 6 All. 509 (F.B.). 2. (1888) I.L.R. 12 Mad. 153.
3. (1921) 14 L.W. 418. 4. (1929) I.L.R. 10 Lah. 283 (F.B.).

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brothers Mockett and Horwill, JJ., in their Order of Reference, namely, In re *Periakaruppan*[1] a decision of myself and Sundaram Chetty, J., reported in In re *Periakaruppan*[1]. There the prisoner made a statement to the police during investigation that he threw into a channel the aruval with which he cut the deceased and buried in the hollow of a tree the ornaments worn by the deceased. He also showed the places to the police wherefrom they were taken out. In this case again there was a strenuous argument on the appellant's behalf as in *Sogaimuthu Padayachi* v. *King-Emperor*[2] that the statement by the accused that he threw into the channel the aruval and buried the ornaments in the hollow of the tree should be excluded as being inadmissible; but we say:

> " It is quite clear that that part of the statement of the appellant where he says that he had hidden the aruval and buried the other ornaments is admissible in evidence against him. Otherwise his evidence is incomplete and may even be unintelligible."

We do not admit the statement that it was the aruval with which the accused cut nor the statement that the ornaments were those which he took from her body. To that extent the judgment is inconsistent with *Sogaimuthu Padayachi* v. *King-Emperor*[2] and is opposed to the view of Fforde and Jai Lal, JJ., in *Sukhan* v. *The Crown*[3] and the opinion of Sadasiva Aiyar, J., in *Manjunathaya* v. *King-Emperor*[4] but the learned Public Prosecutor has reminded me that the question of the admissibility of that part of the accused's information was never argued at all and that as a matter of fact he was not called upon to argue the case on behalf of the Crown, the case on the evidence before us having been very clearly proved without the assistance of that part of the confession. It seems to me, therefore, that we assumed that those words should be excluded without hearing any argument to the contrary an assumption which I now think was incorrect. Then there is the decision of the Patna High Court in *Lalji Dusadh* v. *King-Emperor*[5]. There the accused in answer to the investigating Police Officer stated that he threw the weapon with which he assaulted the deceased at a certain place the weapon was discovered as the result of that information and the statement consisting of the assertion that the weapon had been thrown

1. (1931) R. T. No. 11 of 1931.
2. (1925) I.L.R. 50 Mad. 274.
3. (1929) I.L.R. 10 Lah. 283 (F.B.).
4. (1914) 26 M.L.J. 352.
5. (1927) I.L.R. 6 Pat. 747.

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at a particular place and that it was the weapon with which the offence was committed was held admissible under S. 27. This is directly in agreement with the view taken in *Sogaimuthu Padayachi* v. *King-Emperor*[1]. On p. 757, Mullick, A.C.J., says:

"It is contended on the authority of some cases that the prosecution is only entitled to prove that the accused in answer to a certain question gave information which led to the discovery of the weapon; but common sense requires that the discovery should be connected with and be relevant to the investigation. The omission to connect the weapon with the offence would render the provisions of S. 27 of the Indian Evidence Act wholly nugatory. The whole confession of a prisoner in police custody cannot of course go in but where the confession includes a statement that a weapon was used for committing the offence charged that part of the confession can certainly go in if it leads to the discovery of the weapon".

And he cites *Sogaimuthu Padayachi* v. *King-Emperor*[1] in support of his opinion. Before leaving these cases I will again refer to *Queen-Empress* v. *Babu Lal*[2]. There the fact that the accused had sold the cow and calf to a particular person was a relevant fact because they were identified as being the property of the person from whom they were stolen. They were therefore connected with the offence charged against the accused, namely, assisting in concealment of stolen property (S. 414, Indian Penal Code). The cow and the calf were shown to have been stolen and the statement of the accused that they had sold them to a person one Abdul Rahman in whose possession as a result of the information they were found to be by the police also directly connected the accused with that offence without the further information that the accused had stolen them and that is where the observations of Straight, J., which I have set out earlier in my judgment apply, namely, that not one word more than is absolutely necessary to show how the fact that was discovered is connected with the accused so as in itself to be a relevant fact against him can be deposed to by the police officer since the fact discovered must also be connected with the offence as well as with the accused it follows from this that—if the statement of the accused does connect it with the offence then that is admissible also.

The cases to which I have referred clearly show that there is a preponderance of opinion supporting the appellants. Nevertheless, I am more impressed with the reasons given in

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1. (1925) I.L.R. 50 Mad. 274. 2. (1884) I.L.R. 6 All. 50 (F.B.).

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support of the minority view. The fact deposed to and the fact discovered obviously must be relevant and the fact or thing discovered can only be relevant if it is connected with the offence of which the accused is charged; and the confession in the section is a confession of the offence charged and not of anything else. Before the statement is given in evidence it must be shown that fact discovered is a relevant fact and that the object is a material object. In cases where the things discovered as a result of the accused's information are proved to be properly stolen from a person and the subject of the charge or worn by the victim of a murder, just before the murder is committed, the property so discovered is directly connected with the crime and the fact thereby discovered relevant. It can be made relevant by evidence *aliunde*, and it can be made relevant by the statement of the accused itself. Suppose there is no evidence *aliunde*, what warrant . . . . is there for saying that the part of the statement of the accused that makes it relevant must be excluded because it amounts to a confession? Is there any warrant for garbling the statement in order to make it innocuous to the accused and in the process causing it to be irrelevant and consequently inadmissible in evidence? That is often the effect of removing from a statement the confessional portion, as what is left is by itself meaningless. Take the present case. If the appellants' contention is correct, only the following words can be admitted:

> "They buried (1) the empty bottle, (2) a rope and the cloth gag used for gagging the mouth in a dung hill next to the cattle-shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallipatti and that he would go and take them and produce them".

As it stands, the statement is unimportant as, without more, the empty bottle, the rope and the cloth gag are not connected with the offence. There is nothing to show that the rope was the rope used on the neck of the deceased or that the cloth was used to gag him with; and indeed there is no evidence at all otherwise to show that the victim had been gagged. I am clearly of the opinion that without the earlier portion of the statement no relevant fact was discovered by the police as a result of it. I will give an example which supports my view. *A* is murdered and the medical evidence shows that he died as the result of a wound which is consistent with its having been caused by a sharp cutting weapon. *B* an

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agriculturist is accused of the murder and whilst in custody states to the police: "I threw the *bichuva* with which I cut *A* into the back room of my hut." The police go to his hut and there find the *bichuva*. They have discovered a relevant fact. Strike out the words "with which I cut *A*" and all that remains is "I threw the *bichuva* into the back room of my hut." What is there to connect the *bichuva* with the murder? Every agriculturist has one *bichuva* or more in his possession. What *bichuva* is this? There is no evidence otherwise that it was the *bichuva* with which the murder was committed. It is merely a *bichuva* and if the police discover it they have not discovered a relevant fact. The statement, the confessional part having been struck out, is irrelevant; and none of it would go in under S. 27; and indeed, were that the law, no attempt to put it in would ever be made. Further, it is undisputed that the information must set the police in motion, because it is in consequence of it that the discovery is made. Would the police be set in motion merely by the statement of the accused that he threw a *bichuva* into the back room of his hut if there is no evidence that it is the instrument of the crime? If there is no evidence *aliunde*, then the police will not be set in motion unless the fact discovered is connected with the case under investigation and if it is the accused's statement which connects the fact discovered with the offence and makes it relevant, then even though that statement amounts to a confession of the offence, it must be admitted because it is that that has led directly to the discovery of the fact. If this reasoning is applied to the present case, then the earlier part of it that the accused and Gurunatha Goundan killed the victim by gagging his mouth with a cloth and throttling his neck with hands and also by putting a rope and pressing in connects the rope and the cloth gag directly with the offence and without it they are quite unconnected. Mr. Chandrasekhara Sastri, the learned Counsel for the first appellant, contended that in none of the cases cited was the confessional statement so lengthy as here. I agree. The statement objected to has usually consisted only of a few words such as "stolen from," "we stole from", etc., but in my opinion if those statements are admissible in evidence under S. 27 for the reasons already stated it makes no difference that the statement consists of ten words or twenty words so long as they are necessary to make the fact discovered

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a relevant one care being taken of course not to allow more words to be deposed to than are absolutely necessary. With regard to the information relating to the two bottles of illicit arrack and the discovery of one of them with some arrack in it in a heap of mud in the corner of the compound of the choultry, and the other empty in the dung heap, it is to be observed that this is not within that part of S. 27 which, given the circumstances required therein, makes admissible in evidence a confessional statement. The statement that the bottle would be found in the dung heap, etc., is not a confession but it constitutes "information" leading up to the discovery of a fact which is made material because there is evidence that at a time material to this case the accused was in the near vicinity of the scene of murder carrying a bottle and intoxicated which fact is wholly denied by the first accused in every respect. Upon the second question referred, in my view, so much of the statement set out in question No. 1 as is admissible against the first accused can be taken into consideration as against the second accused. I see no reason for drawing any distinction between the confession in S. 27 and the confession which cannot be proved at all under S. 25, and under S. 26 only when it is made in the immediate presence of a Magistrate or confession made in Court or to a member of the public. There is nothing in the section which restricts the confession to one recorded before a Magistrate. On the other hand, Illustration A to S. 30 suggests that the section contemplates "the taking into consideration" of a confession to an ordinary witness. It follows therefore that all such confessions when the accused are being tried jointly for the same offence when made by one of them affecting himself and another or others of the accused may be taken into consideration as against the other or others under S. 30 of the Evidence Act. In support of this view there are *Sankappa Rai*, In re[1], *Shivabhai* v. *Emperor*[2] and *Periaswami Moopan*, In re[3]. I would therefore answer this question in the affirmative.

The question of whether the same considerations apply to the third accused does not arise as all references to her were deleted by the trial Court and I am only dealing with such part of the statement as was admitted.

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1. (1908) 18 M.L.J. 66: I.L.R. 31 Mad. 127.
2. (1926) I.L.R. 50 Bom. 683.
3. (1930) 59 M.L.J. 471: I.L.R. 54 Mad. 75.

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My answer to question No. 1 is that the following statement is admissible in evidence under S. 27 of the Act, namely:

"He stated that at about 11 o'clock in the night of 26th March, 1936, he and Gurunadha Goundan, son of Erungattur Kanda Goundan, together murdered the deceased Sottayan *alias* Sennimalai Goundan by gagging his mouth with cloth by pressing him with rope . . . . . that that night . . . they got two bottles of illicit arrack . . . . that a small quantity was left over in one bottle only. . . . . After, (1) the empty bottle, (2) a rope and the cloth which was used for gagging the mouth have been buried in cowdung pond adjoining the cattle-shed in the compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallipatti and that he would go there, take them out and give".

And as I have said in my answer to question No. 2 the whole of that statement can be taken into consideration as against the second accused also. It is necessary to add for the information of the Sessions Judges and the police that as pointed out in *Public Prosecutor* v. *Venkoba Rao*[1] by a Bench of this High Court, statements made by an accused which are or may be provable under S. 27 of the Evidence Act should be clearly and carefully recorded by the Police officers concerned. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased. Obviously, if what a man says is to be used in evidence, his own words should be used and not a rendering into the third person of the purport of his statement. With such a record of the statement before him it will then be for the trial Judge to decide how much of it is admissible under the section. I might add that no point has been taken by the accused's advocate in this case that the statement before us was an inaccurate paraphrase. The making of any such statement was wholly denied.

I cannot leave this case without saying that in my opinion the case for the first appellant has been most ably argued by Mr. Chandrasekara Sastri, his learned counsel. Although his efforts have been unsuccessful they clearly deserve such a tribute.

Mockett, J.

Mockett, J.—I agree. I am not, as I intended, delivering a separate judgment in this case as I have had an opportunity of reading the judgment which has been delivered by my Lord the Chief Justice and there is nothing which I can usefully add to that judgment which entirely expresses my views on this most

1. (1937) 2 M.L.J. 32.

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important topic. Moreover I consider that it is most desirable that the Sessions Courts of this Presidency should be able to look for guidance to a single judgment expressing the views of the Full Bench. I would only say that in construing this section of the Indian Evidence Act I have endeavoured to follow the direction of the Judicial Committee relating to the construction of Indian statutes in *Ramanandi Kuer* v. *Kalawati Kuer*[1], namely:

> "To examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English law upon which it may be founded."

In this respect I find myself in respectful disagreement with the observations of Lort Williams, J., at the beginning of his judgment in *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Bhajoo Majhi*[2]. The learned Judge's views as to the correct method of construing the same S. 27 of the Evidence Act do not seem to me to be in accord with the above judgment of the Judicial Committee. If it were not for the very divergent views which have been held regarding this matter in this and other High Courts, I should almost have said that the words of this section are clear enough by themselves if they are read free from the considerations which the Judicial Committee have prohibited. I also agree with the comments on the various cases in the judgment which my learned brother Horwill, J., is about to deliver.

Horwill, J.

Horwill, J.—I would like to add to the judgment of my Lord the Chief Justice, with which I completely agree, that the weight of authority against the view we have here held is much less than the array of authorities adduced by the defence would at first sight lead one to believe. *Reg.* v. *Jora Hasji*[3] purports only to be a minute on S. 27 for the instruction of the Courts of that Presidency, without reference to the particular facts of that case. The minute covers not only the point that has been raised before us but all the other aspects of S. 27. The arguments put forward in that case must have been of the most general kind and no authorities seem to have been discussed or considered. Very much the same remarks can be made regarding *Queen-Empress* v. *Commer Sahib*[4] except that that case confined itself to the question which we have

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1. (1927) 54 M.L.J. 281: L.R. 55 I.A. 18 at 23: I.L.R. 7 Pat. 221 (P.C.).
2. A.I.R. 1930 Cal. 291 at 292: 34 C.W.N. 106.
3. (1874) 11 Bom.H.C.R. 242.
4. (1888) I.L.R. 12 Mad. 153.

been considering. In *Queen-Empress* v. *Babu Lal*[1] the real point for consideration which was discussed at great length in the principal judgments of that case, was whether S. 27 of the Evidence Act governs S. 26 only or S. 25 as well as S. 26. The majority of the judges held that S. 27 controls S. 25 also, although Brodhurst, J., and Straight, C.J., held very different views regarding the extent to which the statement actually made could be admitted in evidence. In *Adu Shikdar* v. *Queen-Empress*[2], Norris, J., who delivered the judgment of the Court, thought that no relevant fact had been discovered in pursuance of the confessional statement and so although he approved of the remarks of Straight, C.J., in *Queen-Empress* v. *Babu Lal*[1] the question as to how much of a statement such as we have been considering could be admitted did not there directly arise. That part of the sentence admitted in *Queen-Empress* v. *Nana*[3] probably did not differ materially from what would be admissible upon an application of the principles enunciated by my Lord the Chief Justice in his judgment above. The identity of the property was fixed by the question put by the police to the accused and the portion considered inadmissible by the Judges in that case still leaves a sentence which is complete in itself. The accused was asked what he had done with the property and he replied "I have kept it and will show". The portion "have kept it and" were held to be inadmissible. That would leave the answer to the question of the Police as "I will show", which makes perfectly good sense. *Amiruddin Ahmed* v. *Emperor*[4] was concerned with the admissibility of a confession made at the time of discovery; and it was rightly held such a confession did not lead to the discovery of the property. Certain ornaments taken in a dacoity were dug up and when they were brought to light the accused said: "I got these ornaments as my share in the Rajoi dacoity". This confession was very obviously inadmissible. *Ganu Chandra* v. *Emperor*[5] was one of those difficult cases in which the actual words used by the Police in questioning the accused and the words by the accused in reply were not known. Only the general purport was given and Beaumont, C.J., in the principal judgment in that case, said:

"It was the duty of the Judge to dissect the evidence regarding the con-

1. (1884) I.L.R. 6 All. 509 (F.B.).
2. (1885) I.L.R. 11 Cal. 635.
3. (1889) I.L.R. 14 Bom. 260 (F.B.).
4. (1917) I.L.R. 45 Cal. 557.
5. (1931) I.L.R. 56 Bom. 172.

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fession and to divide the sentence into its component parts and only admit that part which led to the discovery of the particular fact, *viz.*, the hidden property."

In such circumstances this procedure seems justifiable. In *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Bhajoo Majhi*[1] a contrary view to that held by us was undoubtedly arrived at; but some of the remarks made by Lort Williams, J., in the principal judgment in that case are instructive as showing why it is that such divergence of opinion exists with regard to the proper interpretation of S. 27. He says:

" There is a school of legal thought in India which holds that in construing Acts of the Indian legislature, the natural meaning of the sections should be given effect to regardless of previous decisions, and especially of decisions other than those of Indian Courts. The Indian Evidence Act in general and S. 27 in particular are examples which in my opinion indicate the falsity of this point of view".

He comes to the conclusion that:

" Some restricted or limited meaning, narrower than the natural meaning, must be given to these words."

This in our opinion is contrary to the canon of interpretation laid down by their Lordships of the Privy Council in many cases, of which *Ramanandi Kuer* v. *Kalawati Kuer*[2] may be quoted as an example. The judgment of Lort Williams, J., except with regard to the method to be adopted in interpreting S. 27, supports the view which we have here taken. He says:

" If their natural meaning were given to the words of S. 27 regardless of their parentage and history, I am satisfied that the result would be contrary to the intention of the legislature. It would be so wide as to render S. 26 practically useless. . . . . If therefore so much of the information as is clearly connected with, or has reference to, the fact thereby discovered, is admissible under S. 27, it is difficult to see where the line can be drawn."

In other words, he was of the opinion that when a confession to the police which would be inadmissible under S. 26 leads to the discovery of property, the whole confession may be admissible if the natural interpretation of S. 27 were adopted. That is exactly our view. It is the attempt to interpret S. 27 in the light of the existing English law that has led a great many Courts to give an interpretation to that section which is not warranted by the words used, and

1. A.I.R. 1930 Cal. 291 at 292: 34 C.W.N. 106.
2. (1927) 54 M.L.J. 281: L.R. 55 I.A. 18: I.L.R. 7 Pat. 221 (P.C.),

especially is this the case in *Sukhan* v. *The Crown*[1] which has been so fully discussed by my Lords.

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B. V. V. ——— *Reference answered against accused.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of New South Wales in its equitable jurisdiction.]

PRESENT:—LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN AND SIR LYMAN POORE DUFF.

Permanent Trustee Company of New South Wales, Limited, and another .. *Appellants**

v.

Francis Henry Bridgewater .. *Respondent.*

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Vendor and purchaser—Sale of reversion—Transaction substantially unfair—Inference from circumstances—Inadequacy of price as relevant factor—Vendor being without adequate protection—Power of Court to award relief against sale—New South Wales Conveyancing Act, 1919, *S. 30.*

Though inadequacy of price is not alone sufficient to authorise the vacating of a contract for the sale of a reversion, inadequacy of price coupled with inexperience and absence of any competent advice on the part of the seller are sufficient to set in motion the protective powers of the Court of Equity. Where the vendor was a young man urgently in need of cash and with no relation in the country to guide him and he was selling his expectant interests to a creditor who already had a powerful grip on them as security for his debt, and the price was fixed between them alone, there being no bargaining or inquiry for a better market on the young man's behalf, and though a lawyer was formally consulted the transaction was put through in great hurry without any real advice from anybody, and the price paid was substantially below the true value of the interests sold,

Held, that the relative positions of the parties and the circumstances were such that it was incumbent on the purchaser to establish affirmatively that the transaction was fair, just and reasonable, that the evidence in the case tended to a contrary conclusion and that the transaction should therefore be set aside.

Earl of Aylesford v. *Morris,* (1873) 8 Ch. 484 and *O'Rorke* v. *Bolingbroke,* (1877) 2 App. Cas. 814, referred to.

Decision of the Supreme Court of New South Wales in its equitable jurisdiction affirmed.

Consolidated appeals from the Supreme Court of New South Wales in its equitable jurisdiction.

F. R. Evershed and *W. Barton* for Appellants.

H. H. Mason and *Kenelm Preedy* for Respondent.

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1. (1929) I.L.R. 10 Lah. 283 (F.B.).

* P. C. Appeal No. 61 of 1935. 16th October, 1936.

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16th October, 1936. Their Lordships' judgment was delivered by

LORD RUSSELL OF KILLOWEN.—In this case their Lordships have to advise His Majesty in relation to an appeal by the executors of one Bertram Murray, deceased, and a cross-appeal by one Francis Henry Bridgewater, in an action instituted for the purpose of setting aside a sale by Bridgewater to Murray of Bridgewater's expectant interests under certain wills.

Murray was a moneylender who carried on business at Sydney. Bridgewater is a young Englishman who was born on the 29th September, 1906, and who at the age of 17 arrived in South Australia as an assisted emigrant. For some three or four years he drifted about from one job to another in South Australia and Victoria. Eventually he arrived in Sydney at the end of the year 1927, with about £2 in his pocket. He had, however, also a letter (dated the 4th October, 1927) which he had received from an uncle in England, in which references were made to his interests under the wills of his father and his grandfather.

Armed with this letter he went to see Murray whose advertisement he had read in the papers. Murray gave him a few shillings, and cabled to his own solicitors in London (Light and Fulton) for information. In reply he received a cable on the 9th February, 1928, in the following terms:—"Bridgewater entitled share value roughly £4,000 grandfather's estate on attaining 25, also three-fifths father's estate on attaining 27 subject life rent in one quarter no information yet value." On receipt of this cable Murray began to make advances from time to time to Bridgewater on the security of his interests under the wills, with the result that on the 18th September, 1928, there were outstanding the following securities on those interests, *viz.*:—A mortgage dated the 15th February, 1928, to secure the payment of a principal sum of £675; a further charge dated the 21st February, 1928, to secure the payment of a further principal sum of £175 10*s*., and a further charge dated the 22nd March, 1928, to secure the payment of a further principal sum of £1,309 10*s*. In each case the principal sum secured included interest for one year at the rate of 30 per cent. per annum on the moneys advanced, and such principal sum if not repaid at the expiration of 12

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months carried interest at the rate of 20 per cent. per annum. The Judge who tried the action found that the terms of the mortgage loans were, in the circumstances of the case reasonable, and no complaint is made in regard thereto.

At the end of March, 1928, Bridgewater went to England; he arrived back in Australia in August, 1928, with little or no money, but he was able to secure some employment.

At this point it will be convenient to indicate the nature of his interests under the wills of his grandfather Francis Matthew Bridgewater and his father Francis Franklin Bridgewater. Under his grandfather's will one-eighth of the residuary estate was held upon trust as to one-half for his father for life, and after his father's death upon trust for his father's issue as his father should by will appoint, and as to the other half upon trust that the trustees should apply the income during Bridgewater's minority towards his advancement and education as they might in their uncontrolled discretion think proper, and subject thereto (the will proceeded):—

"My trustees shall hold the said remaining half share upon trust for my said grandson absolutely upon his attaining the age of 25 years and in the event of my said grandson dying before he shall attain the age of 25 years or after that age without leaving issue capable of taking a vested interest in such one half share then upon trust for all and every other the children of my said son Francis Franklin Bridgewater who shall be born within 21 years after my death as and when he or she shall attain the age of 25 years or if a daughter shall previously marry and if more than one in equal shares and failing such other children of the said Francis Franklin Bridgewater then upon trust for all my other children or their issue living at my death other than the said Francis Franklin Bridgewater."

By his will his father exercised his abovementioned testamentary power of appointment in the following words:—

"I hereby appoint and direct that from and after my decease the one half of the eighth share of the residuary estate of the said Francis Matthew Bridgewater the income whereof is under the said will payable to me during my life shall be held upon the trust following (that is to say) such part thereof as shall be equal to the share or interest which my said son Francis Henry Bridgewater takes or shall hereafter take under the said will in the remaining half of the said eighth share shall be held in trust for my said daughter Elizabeth Dulcie Bridgewater absolutely and the residue (if any) of the said first mentioned one half of the said eighth share shall be held in trust for my said son Francis Henry Bridgewater and my said daughter Elizabeth Dulcie Bridgewater in equal shares as tenants in common."

His own estate he disposed of by giving his wife an interest therein during widowhood which, in the event (which happened) of her remarriage, was cut down to the income of one-fourth during her life: and subject to those trusts he

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declared that three-fifth parts of the residuary trust fund and the income thereof should be held in trust for Bridgewater absolutely if he should attain the age of 27 years. The will also contained a declaration that if Bridgewater should marry a first or second cousin he should forfeit all interest under the will.

It is obvious that each will gave rise to questions. Under the grandfather's will the interest was contingent on Bridgewater attaining the age of 25 years, and was expressed to be subject to a defeasance even after he had attained 25 in favour of a class (of which it might be said that it was not ascertainable within perpetuity limits), whom failing then in favour of a class ascertainable within legal limits. It is not for their Lordships to construe the will, but clearly arguments suggest themselves ranging from the contention that on Bridgewater attaining 25 his interest was indefeasible, to the view that on his death after attaining 25 without leaving issue an intestacy would supervene as to the particular share of residue. In fact as their Lordships were informed some five or seven counsel were consulted at different times and in different hemispheres, and if it be not literally true to say *quot homines, tot sententiae*, the opinions expressed were sufficiently at variance to justify the statement that the true construction of the grandfather's testamentary disposition was not a matter entirely free from doubt.

As regards the father's will, apart from the exact effect of the appointment in favour of the daughter and the forfeiture clause, the document is reasonably plain. Bridgewater took in the events which happened three-fifths of his father's residue (subject to his mother's life interest in one-fourth of the entirety) contingently on his attaining the age of 27 years. The position, however, was complicated by the circumstances that his mother was in fact the sole trustee, and that there were questions whether certain assets, which she claimed to be her property, formed part of the father's estate; and also whether the father's estate had remained intact in her hands. However, while in England, Bridgewater had reached a compromise with his mother under which his share in the capital of the estate had been agreed at £1,450.

Bridgewater soon after his return to Australia in August, 1928, being in need of money, approached Murray for a

further advance. Bridgewater was then aged 21, nearly 22. Meanwhile a cable had been received from London, to the effect that counsel had advised that it was very doubtful whether under the grandfather's will the interest vested (that is, indefeasibly) at 25. Mr. Murray then took the opinion of eminent counsel in Sydney, who advised on the 8th September, 1928 (1) that Bridgewater's interest in the capital of the grandfather's estate would pass from him under the gift over in the event of his dying at any time without leaving issue and (2) that he was not then entitled, but on attaining 25 would be entitled, to the accumulated and accruing income of the share.

Murray then declined to make any further advances by way of loan on the security of Bridgewater's interests under the wills, but stated that he was willing to purchase those interests out and out. Notwithstanding doubts as to the true construction of the grandfather's will, Bridgewater was undoubtedly entitled to a substantial sum in respect of income on attaining 25 (stated at this date to be £1,000) and to further sums in respect of corpus (£1,450) and income under his father's will on attaining 27. His death under either of those ages was an event unlikely and therefore easily insurable. The total sum due on the incumbrances which Murray held was some £2,160; but by the 17th September, 1928, further sums had been advanced by Murray to Bridgewater bringing his total indebtedness on that date to a sum of £2,203 17*s*. 7*d*.

Murray offered to purchase the whole of Bridgewater's interest in his grandfather's estate, and his interest in his father's estate (to the extent of £1,450) for the sum of £125, and this Bridgewater agreed to accept. Murray, however, told Bridgewater that a solicitor must advise him, and a Mr. Taylor acted in that behalf. No suggestion is made against Mr. Taylor's honesty, but as will appear the protective assistance which he afforded to Bridgewater was in fact *nil*.

An assignment on the contemplated lines was prepared by Clisdell, who was Murray's managing clerk. In preparing the assignment Clisdell inserted a sum of £184 as the consideration, to cover other items debited against Bridgewater in Murray's ledger which were not covered by the mortgages, and also the estimated costs due to Light and Fulton. Bridge-

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water was to receive £125 nett, and as Clisdell said in his evidence, "I did not really consider it was very material what the assignment was filled in for, so long as Bridgewater got his £125."

On the 17th September, 1928, Clisdell on behalf of Murray wrote and sent a long letter to Mr. Taylor giving him full information, and stating that if Bridgewater still wished to complete, the assignment would be forwarded. Bridgewater saw Mr. Taylor on the 18th September, 1928. Apparently all that passed between Taylor and Bridgewater was that Bridgewater (in reply to Taylor's statement that he considered the price insufficient) said that he was determined to sell; whereupon Taylor read to him the draft assignment and said he was rather a foolish young fellow. He then dictated a letter to a typist which Bridgewater signed, in the terms hereinafter mentioned. They then went to Murray's office, where the transaction was completed. Bridgewater executed the assignment expressed to be in consideration of a sum of £184. He actually received £118 for which he signed a receipt in the following terms:—"Received from B. Murray the sum of £118 in full settlement *re*: the sale of my whole share or interest in my late grandfather's estate and my share or interest in my late father's estate to the extent of £1,450—18th September, 1928." The odd £7 making up the £125 he had in fact received as to £2 four days before and as to £5 on the day before.

The letter which Mr. Taylor obtained from Bridgewater on the 18th September, 1928, was addressed to his firm and ran thus:—

"After fully discussing the question with you of selling to Mr. Bertram Murray the share in the estate of my late grandfather Francis Matthew Bridgewater and also the share in the estate of my late father Francis Franklyn Bridgewater amounting to £1,450, I have decided to complete such sale in view of the fact that I am so heavily indebted to Mr. Murray, and would be unable to raise by way of mortgage sufficient money to discharge the amount owing to him, and furthermore I am influenced in my decision by the opinion of counsel regarding my share in my grandfather's estate, both of counsel in England and in Sydeny.

"I fully appreciate the disparity between the consideration money, and the probable value of my shares in the estates mentioned as pointed out by you, but in view of the doubtful legal position regarding my share in my grandfather's estate, I think this counterbalances the difference in price between what I am receiving from Mr. Murray, and what I may receive under thase estates subject to the contingencies mentioned in the will of my grandfather."

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There was a conflict of evidence as to whether Bridgewater saw Mr. Taylor more than once, namely, on the 18th September. Clisdell suggested more than one interview. Bridgewater denied this. Unfortunately Murray and Mr. Taylor were both dead at the date of the trial. The defendants, however, put in evidence Mr. Taylor's diary entry, from which it would appear that only one interview took place between them. It is in the following words:—

"18th inst. On receipt of letter from Bertram Murray with copy will of Francis Matthew Bridgewater, copy will of Francis Franklyn Bridgewater, opinion of Mr. Maughan K. C. cables and letters perusing. Attending you on your calling conferring at length and advising you that we thought the purchase money offered for your shares in the estate of your grandfather and father was not adequate, but you informed us that you were determined to sell in view of your indebtedness to Mr. Murray, and furthermore the legal doubt that existed as to what share you actually took in your grandfather's estate. Perusg. Assignment from yourself to Mr. Murray which you handed us also declaration. Reading this over and explaining same to you and you were quite satisfied therewith. Attending Mr. Murray's office with you when you executed assignment and declaration and received purchase money."

From these facts it appears to their Lordships that Mr. Taylor made no attempt to advise his youthful client, or to assist him in resisting the temptation to exchange his future prospects for immediate cash, or to counteract the pressure which must almost necessarily exist where a debtor is negotiating with one who is his creditor concerning the sale of property which already stands as security for a large indebtedness between them. He never even suggested making inquiries from insurance companies to see whether better terms were not obtainable. He simply accepted as irrevocable the young man's expressed determination to sell at the price which he had already agreed with his creditor, and contented himself with explaining the contents of the draft document which the creditor had prepared for that purpose.

The Chief Judge in Equity, exercising the equitable jurisdiction of the Supreme Court of New South Wales, has set the sale aside as an unfair dealing with an expectant heir. He has held that the sale was at an undervalue, that Mr. Taylor did not do his duty to Bridgewater, who being in need of money overbore Mr. Taylor, and that in the circumstances the transaction was not a fair deal between Murray and Bridgewater.

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It is necessary at this stage to refer to S. 30 of the Conveyancing Act, New South Wales, 1919. That section is couched in terms so similar to those of S. 1 of 31 and 32 Vic. c. 4, that the two sections may be treated as identical in considering the judicial comments which have been made in this country on the subject of the latter enactment. The New South Wales Act (S. 30) enacts the following provision:—

> " No purchase of any reversionary interest in any property made in good faith and without fraud or unfair dealing shall hereafter be opened or set aside merely on the ground of undervalue."

The remarks which Lord Selborne made (see *Earl of Aylesford* v. *Morris*[1]) in reference to the English Act and its effect are clearly applicable to the New South Wales enactment. He stated the position in these words:—

> " The Act as to sales of reversions (31 Vict. c. 4) is carefully limited to purchases 'made *bona fide* and without fraud or unfair dealing,' and leaves under value still a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree whatever altered the *onus probandi* in those cases, which according to the language of Lord Hardwicke, raise 'from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness'—a presumption of fraud. Fraud does not here mean deceit or circumvention; it means unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just and reasonable."

Further the language used by Lord Hatherley may properly be quoted, notwithstanding that it is contained in a judgment in which, on the facts, he disagreed with the views of his colleagues. In the case of *O'Rorke* v. *Bolingbroke*[2] he said (at p. 823):—

> " But in the case of the expectant heir, or of persons under pressure *without adequate protection* . . . the burthen of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract. "

And again (at p. 829):—

> "The Court protects expectant heirs . . . against the consequences of their not being on equal terms with the buyer, or in a position fully to understand the value of their interest, and justly to estimate the proposals made to them. . . .
>
> " Inadequacy of price is not alone sufficient to authorise the vacating of a contract for the sale of a reversion, but inadequacy of price coupled with the inexperience and absence of any competent advice on the part of the

1. (1873) 8 Ch. 484 at 487.
2. (1877) 2 App. Cas. 814.

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seller are sufficient to set in motion the protective powers of the Court of Equity."

It was contended before their Lordships on behalf of Murray's executors (*a*) that on the evidence there was no undervalue in the price given, (*b*) that the onus was therefore on Bridgewater to show want of good faith, fraud or unfair dealing, (*c*) that this onus had not been discharged and therefore (*d*) that even assuming some undervalue in the price given S. 30 of the New South Wales Act afforded a complete defence to the action.

Their Lordships cannot accede to any of these contentions, and in this case with all the evidence before them they find themselves able to deal with the matter irrespectively of any questions of onus.

Upon the evidence they are satisfied that the price given was a price not slightly but substantially below the true value of the interests which were sold, making all allowances for uncertainty as to the exact construction and effect of the grandfather's will in relation to corpus. They agree with the view of the Chief Judge in Equity in this regard, a view which their Lordships believe to have been reached after a consideration of the whole evidence, and not to be based upon any alleged mistake as to the result of the evidence given by Mr. Wolfenden.

Further their Lordships are satisfied that S. 30 of the New South Wales Act affords no defence.

The circumstances in which the transaction was carried out present many disquieting features. The vendor was a young man not yet 22 years old, urgently in need of cash, and with no relation in the country to guide him. He was selling his expectant interests to a creditor who already had a powerful grip on them as security for his debt. The price was fixed between them alone. There was no bargaining or inquiry for a better market by anyone on the young fellow's behalf. The matter cut and dried, with draft assignment already prepared, was placed before Mr. Taylor and was carried through without any real advice by him and almost without breathing space, in a few hours of a single day. A transaction carried out in these circumstances does not appear to their Lordships to be a purchase made in good faith and without unfair dealing.

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The relative positions of the parties and the circumstances were such that it was incumbent on Murray's executors to establish affirmatively that the transaction was fair, just and reasonable. Not only have they failed to do this, but the evidence as a whole leads to the contrary conclusion. The transaction accordingly cannot stand, and the appeal should, in their Lordships' opinion, fail.

The cross-appeal raises two points; one a question of fact, and the other a question of the form of the decree.

The first question relates to a sum of £51 15*s*. received by Murray in March, 1932, in respect of the surrender value of one life policy and to a sum of £1,732 10*s*. paid or payable under another life policy. The relevant facts should be stated.

At an early stage of the financial transactions between Murray and Bridgewater, Murray stipulated that two policies of insurance on the life of Bridgewater should be taken out and assigned to him. One policy (dated the 22nd February, 1928) for £1,000, and another (dated the 4th April, 1928) for £1,500, were effected with the City Mutual Life Assurance Society Limited, and were by an indenture dated the 15th June, 1928, assigned by Bridgewater to Murray absolutely, the consideration expressed in the deed being a sum of £58 15*s*. This sum is the exact amount of the aggregate of the first premiums payable on the policies. There is a conflict upon the evidence, not easy to resolve, as to whether those premiums were borne by Murray or by Bridgewater. By a letter dated the 15th June, 1928, addressed to the insurance company and signed by Bridgewater notice was given of the assignment, and it was stated that Murray was the absolute owner of the policies and that all future notices as to premiums were to be sent to him. The matter had been arranged between Murray and Bridgewater, and the necessary documents had been signed by Bridgewater before his departure for England. The policies were never included in any of Murray's mortgage securities. Whatever may have been the truth in regard to the first premium on each policy, there is no doubt that all other premiums were paid by Murray, and that he never had any security for their repayment, nor was he entitled to charge any interest thereon.

In the month of March, 1932, Murray, having received moneys in respect of Bridgewater's interest under one or other

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of the wills, decided to surrender the policy for £1,000. In order to avoid paying the costs of a perusal by the insurance company's solicitors of the assignment to Murray, Bridgewater signed a written direction to the insurance company to pay the surrender value (£51-15*s.*) to Murray, and he joined with Murray in signing the receipt to the insurance company for that sum.

The other policy contained a provision that in the event of the assured incurring total blindness by an accident, the society would pay the whole of the policy money. This unfortunate event actually occurred in the month of September, 1932, with the result that a sum of £1,732-10*s*. became payable under the policy.

By the statement of claim Bridgewater claimed that the policy moneys all belonged to him, alleging that before the execution of the assignment of the 18th September, 1928, an agreement was made between Murray and himself that in the event of his attaining vested interests under the wills of his grandfather and father, the policies should belong to him free from any claim by Murray. The learned Judge declined to accept Bridgewater's evidence as to this, and his counsel did not press the matter further before their Lordships. It was, however, contended that the policies were part of the security given by Bridgewater to Murray, and that if the assignment of the 18th September, 1928, were set aside and the relationship of mortgagor and mortgagee reconstituted, Murray would be entitled to have the policy moneys brought into account.

The title to the policy money seems to their Lordships to depend on a question of fact, namely, what was the arrangement between the parties when the policies were taken out. The learned Judge heard the evidence of Bridgewater, and considered the admitted facts and the documents. He thought that, in this regard at all events, Bridgewater was not a reliable witness and he formed his own conclusion on the documents the admitted facts and the probabilities. That conclusion he expressed thus—"In my opinion Murray stipulated with F. H. Bridgewater that F. H. Bridgewater should take out policies on his own life and should then assign them absolutely to Murray, Murray then becoming proprietor of the policies free from any control by F. H. Bridgewater. It would be in Murray's power to continue them or to drop them as events turned out." He poses the question which he

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has to decide thus—"In my opinion the only question of fact that arises in regard to this matter is whether the assignment . . . was an assignment by way of mortgage or an assignment absolutely to Murray"; and he ultimately answers it by holding that the policy moneys belonged to Murray, and making a declaration that they are not the subject of account between Murray and Bridgewater but belong to the estate of Murray absolutely.

Their Lordships find it impossible, on the materials before them, to come to any different conclusion. It was urged that the learned Judge had misdirected himself on a vital point, because in the course of his judgment he said that it was quite immaterial who paid the first premiums. But their Lordships do not understand the learned Judge to mean more than this:—that having arrived at a clear opinion, upon all the other facts of the case, that the bargain was that the policies were to belong to Murray absolutely, and were not to form part of the mortgaged property, he did not think it necessary to decide a dispute, which however decided would not have the effect of altering his opinion. Their Lordships are of opinion that upon the first question the cross-appeal should fail.

The second question on the cross-appeal relates to the form of the decree. The trustees of the grandfather's will treating Bridgewater as indefeasibly entitled to his share thereunder on his attaining the age of 25 years (which he did on the 29th September, 1931) paid over considerable sums to Murray as assignee of Bridgewater's interest. The learned Judge while expressing the opinion that the view of the trustees was probably correct, stated that the matter could only properly be decided in the presence of the grandfather's next of kin and perhaps also of Bridgewater's sister. He further stated that difficult matters arose under the father's will, as to the effect of the appointment in favour of his daughter, and the provision against marriage with a first or second cousin. Accordingly he inserted in the decree a declaration that the plaintiff was at present entitled to receive from the estates of the grandfather and father only so much of the income of the said interests of the plaintiff therein as was not required to repay the sums and interest secured by Murray's three securities; and also a declaration in the following terms:—"That the plaintiff will not be entitled to receive from the defendants any capital assets received by the said

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Bertram Murray deceased or the defendants in respect of the said interests of the plaintiff under the said wills or any of them except under the order of a competent Court or with the consent of all the beneficiaries interested."

Bridgewater objects to this provision as being unfair to him, and unnecessary for the protection of the defendants. Their Lordships think that no such provision is necessary as regards the interests under the father's will; and that as regards the interests under the grandfather's will it will be sufficient if the decree is varied by striking out the third and fourth declarations therein contained, and inserting therein immediately after the words "is charged upon the interests of the plaintiff under the said wills or any of them" the following provision:—

"And this Court doth further order that it be referred to the Master in Equity to inquire and ascertain what moneys and investments have been received by the said Bertram Murray and the defendants as his executors under or by virtue of the said assignment of the 18th September, 1928, in respect of the interests of the plaintiff under the wills of his grandfather and father. And this Court doth further order that the Master in Equity do send a registered letter addressed to the Public Trustee in England (1) enclosing a copy of the decree in its altered form, (2) notifying him as one of the trustees of Francis Matthew Bridgewater deceased that unless within four calendar months from the receipt by him of that letter proceedings are instituted to recover the moneys and investments received by the said Bertram Murray or his executors from the trustees of the will of the said Francis Matthew Bridgewater as representing or in respect of the share of the plaintiff in that testator's estate, such moneys and investments will be treated as having been properly paid to and received by the said Bertram Murray and his executors in respect of such share, and (3) requesting him (so far as his knowledge of their whereabouts enable him so to do) to communicate the contents of such letter, or a copy thereof, to the daughter of the said Francis Franklin Bridgewater, the children of the said Francis Matthew Brigewater other than the said Francis Franklin Bridgewater, and the next of kin of the said Francis Matthew Bridgewater".

If no proceedings are instituted within the time limited, their Lordships think that the balance remaining after the Murray securities have been paid off, may then be properly paid over to Bridgewater, leaving it to any aggrieved person to pursue his or her remedy (if any) against the trustees, or to seek such relief (if any) as a tracing of the funds may enable him or her to obtain.

To the extent indicated the cross-appeal should succeed.

In the result their Lordships are of opinion that the appeal should be dismissed, that the cross-appeal should fail as regards the policy moneys, but that an order should be made therein varying the decree to the extent indicated in this

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judgment; and their Lordships will humbly advise His Majesty accordingly.

The appeal and cross-appeal were consolidated and were heard together upon a single case lodged on each side. The appeal has wholly failed. The hearing of the cross-appeal accounted for less than one-fifth of the time occupied by the whole case. It has succeeded only on a point which related to a detail in the form of the decree, and which was disposed of in the space of a few minutes. In these circumstances their Lordships think that justice will be done by ordering the appellants to pay to the respondent three-quarters of his costs of the consolidated appeals.

Solicitors for Appellants: *Light* and *Fulton*.

Solicitors for Respondent: *Waterhouse & Co.*

R. C. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE CORNISH.

Swaminatha Odayar declared major and guardian discharged, *vide* Order dated 26th November, 1936 on C.M.P. No. 4763 of 1936 .. *Appellant** (*6th Respondent*)

v.

T. S. Gopalaswami Odayar and 17 others, Respondents 16 and 17 are supplemental respondents added as per order of Court dated 19th February, 1937 and made in C.M.P. No. 9.6 of 1937 .. *Respondents* (*Respondents Nos. 2, 3, 3rd Petitioner, Respondents Nos. 9, 10, 27, 28, 31, 33, 34, 35, 36, 37 and Nil*).

Swaminatha Odayar *v.* Gopala-swami Odayar.

Practice—Appeal—Joinder of parties—Suit for partition—Family treated as consisting of three branches—Certain members adjudged insolvents—Sub-

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* Appeal No. 60 of 1933. 16th March, 1937.

branch treated as being represented by Official Receiver—Sons of members of sub-branch not impleaded in appeal—Effect—Application for joinder—Sustainability—Civil Procedure Code (V of 1908), O. 41, r. 20.

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In a suit for partition the family was divided into three branches and a preliminary decree for partition was passed by the trial Court. An appeal was preferred to the High Court and the appellate decree effected a further sub-division of shares as between the third and fourth defendants, who belonged to one of the branches, and who by the time of the appeal had been adjudicated insolvents. The case went back to the trial Court and a final decree was passed in due course. One of the defendants preferred an appeal against that decree. The third and fourth defendants were impleaded in the appeal through the Official Receiver but their sons were not joined as parties. It appeared, however, that in the lower Court though the sons were formally on the record they had no separate entity and the decree passed did not recognise their existence, all the parties having assumed that the Official Receiver represented adequately and properly the interests of the sub-family as a whole. It was contended in appeal that the non-joinder of the sons was fatal to the appeal.

Held, that the sons of the third and fourth defendants were proper but not necessary parties to the appeal and that their non-joinder was not fatal to the appeal.

Held, further, that even if they were necessary parties it was a proper case for the appellate Court exercising its discretionary powers under O. 41, r. 20, Civil Procedure Code, to implead those persons as respondents to the appeal.

It cannot be said that no person against whom the right of appeal has become barred can ever be added as a respondent under O. 41, r. 20 of the Code.

Subramanian Chetty v. *Veerabhadran Chetty,* (1908) 18 M.L.J. 452: I.L.R. 31 Mad. 442; *Chockalingam Chetty* v. *Seethai Ache,* (1927) 54 M.L.J. 88: L.R. 55 I.A. 7: I.L.R. 6 Rang. 29 (P.C.) and *Ma Than May* v. *Mohamed Eusoof,* (1931) I.L.R. 9 Rang. 624, considered.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam dated the 26th day of September, 1932 and passed in I.A. No. 695 of 1930 in O.S. No. 22 of 1924.

V. Radhakrishnayya and *S. Ramanuja Aiyangar* for Appellant.

T. R. Venkatarama Sastri, K. S. Desikan, C. S. Vidyasankaran, N.A. Krishna Aiyar, T.R. Srinivasa Aiyangar, S. Venkatesa Aiyangar, S.R. Subramania Aiyar, P.R. Ganapathi Aiyar, N. K. Ananthapadmanabhan, K. Bhashyam Aiyangar, V.C. Viraraghavachari, R. Visvanatha Aiyar, S. Tyagarajan and *R. Rajagopala Aiyangar* for Respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—An objection which ought to have been taken *in limine,* has been raised at the closing stage of a long argument, to the effect that the appeal, is incompetent on account of certain parties not having been added as respon-

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dents. We do not at present propose to set out the history of this long-drawn litigation, for, it is sufficient to state just a few facts in order to deal with the contention raised. This was a partition suit commenced nearly two decades ago and the members of the family to which the action relates, owned considerable properties when it started, but they have since been reduced, with the exception of the sixth defendant, to such straits, that some are represented by the assignees in insolvency, and the others, by the trustees under a composition deed. The only solvent member now of the family is the sixth defendant and he is the appellant before us. There are several memoranda of objections in the nature of cross-appeals which have been filed. The principal contesting respondent is the third defendant represented by the Receiver in insolvency and the preliminary objection referred to above has been raised by his counsel, Mr. Venkatarama Sastri. In the action originally the family was divided into three branches: the first consisting of the plaintiff, the second of defendants 1 and 2, and the third of defendants 3 to 8. The preliminary decree of the trial Court passed in 1924 separately allotted to the sixth defendant of the third branch a distinct share, the integrity of this branch not having been otherwise disturbed. We must observe that defendants 3, 4, 5, 7 and 8 form two sub-families: (1) defendant 3 and his sons defendants 5 and 7, and (2) defendant 4 and his son defendant 8. An appeal from the preliminary decree was filed here and during its pendency the third defendant was adjudicated insolvent in 1925 and the fourth defendant in 1927. With only one aspect of the appellate decree passed by the High Court we are now concerned, namely, that it effected a further sub-division of shares as between the third and the fourth defendants. The ultimate position as settled by the High Court's decree, so far as the shares were concerned, was thus:

(1) Plaintiff	.. 1/5th share.
(2) Defendants 1 and 2	.. 4/15ths share.
(3) Defendant 6	.. 4/15ths share.
(4) Defendant 3 and his sons defendants 5 and 7	.. 2/15ths share.
(5) Defendant 4 and his son defendant 8	.. 2/15ths share.

The case went back to the trial Court which in due course passed a final decree, which the sixth defendant as the appellant now attacks.

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The preliminary decree, which was confirmed by the High Court, has held defendants 3 to 8 jointly accountable to the other branches of the family in respect of certain matters, that is to say, the question as between defendants 3 to 8 on the one hand and the plaintiff and defendants 1 and 3 on the other, is concluded by the judgment already pronounced by the High Court; but the point yet remained to the decided, namely, as among themselves (that is, defendants 3 to 8) how much of this common burden was each of the sub-groups to bear?—in other words, how much was to be borne by the third defendant's sub-group consisting of himself and his sons defendants 5 and 7, how much by the fourth defendant's sub-group consisting of himself and his son defendant 8 and how much by the sixth defendant? The learned Subordinate Judge, after dealing under various heads with sums of money amounting to several lakhs, passed a final decree, containing in the result *inter alia* the following directions:—

(1) The sixth defendant shall pay Rs. 2,177-9-0 to the plaintiff's branch, Rs. 10,515-7-6 to defendants 1 and 2 and Rs. 18,385-1-6 to the fourth defendant's branch;

(2) The third defendant's branch shall pay the fourth defendant's branch Rs. 10,932-2-3.

The sixth defendant complains that the Subordinate Judge has wrongly apportioned the liability, his contention being, that had the learned Judge given effect to correct legal principles, a large amount would have been found payable to him by the third defendant's branch.

The preliminary objection arises thus. While the third and the fourth defendants (through the Official Receiver of West Tanjore and the Official Assignee of Madras respectively) have been impleaded as respondents to the present appeal, their sons have not been, and it is argued that their non-joinder is fatal to the appeal. Mr. Radhakrishnayya, the appellant's learned Counsel, in answer contends that the sons of the third and fourth defendants, though *proper* parties and might have been joined as a matter of convenience, are not necessary parties. This argument, in our opinion, is well founded. The lower Court throughout refers to the entities known as the third defendant's branch and the fourth defendant's branch; nowhere does it in its long judgments refer to their sons as possessing any individual or distinct interest. Indeed, they have been so treated as if their individuality has

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become merged in that of their fathers and their separate existence has not been recognised or even noticed. This is not surprising, as the judgment of the High Court did not direct an *inter se* division notwithstanding that their fathers had been adjudicated insolvents. What is more, when the various points bearing on the question of the apportionment were being considered in the lower Court, all the parties concerned assumed without hesitation, that the Official Receiver in each case represented adequately and properly the interests of the sub-family as a whole; not a single point seems to have been put forward as affecting the interests of the sons as distinct from those of their fathers. In fact, if the sub-group gained, each member of it gained also; if it lost, it was equally patent that every member likewise lost. This being so, the learned Subordinate Judge in the decretal portion of his judgment directs the third defendant's branch to pay and the fourth defendant's branch to receive. Though, therefore, in the lower Court the sons were formally on the record, they had no separate entity and the decree passed does not recognise their existence. They are in our view therefore proper but not necessary parties to this appeal. The appellant's Counsel, however, as a matter of expediency and convenience, now applies that they should be added as respondents. So much time and money has already been wasted and every step should be taken, if possible, to prevent the remnant of this estate from being wrecked. We therefore comply with his request and direct the sons or their representatives to be joined.

Granting, however, that the parties sought to be added are not merely proper but necessary parties, the effect of whose non-inclusion is fatal to the appeal, the question arises whether the defect can be cured under O. 41, r. 20, Civil Procedure Code, which runs thus:

" Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent."

Mr. Venkatarama Sastri broadly argues, relying upon the decision of the Judicial Committee in *Chockalingam Chetty* v. *Seethai Ache*[1] that no person against whom the right of appeal has become barred, can ever be added as a respondent under

1. (1927) 54 M.L.J. 88: L.R. 55 I.A. 7: I.L.R. 6 Rang. 29 (P.C.).

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this provision. We are unable to agree that this is the effect of the decision cited above. It must be remembered that their Lordships' judgment delivered by Sir John Wallis confirmed the judgment of the Rangoon High Court in *Chockalingam Chetty* v. *Seethai Ache*[1] and that the judges of the Rangoon Court in their judgment followed the Madras decision in *Subramanian Chetty* v. *Veerabhadran Chetty*[2] to which Sir John Wallis was himself a party.

The point is fully and clearly dealt with in the Madras case and to understand the Privy Council decision, we must turn to the law contained in the judgment of the Madras High Court. Now, let us turn to the facts in *Chockalingam Chetty* v. *Seethai Ache*[3] to appreciate the real import of that decision. There were two suits, but for the present purpose it is sufficient to advert to one of them. The plaintiff there challenged the transfer made by the insolvent to the first defendant and by the first to the second defendant, Singaram Chetty the defendant in possession. The District Judge dismissed the suit, holding that the sales were perfectly valid and not *benami* as alleged. The plaintiff filed an appeal to the High Court at Rangoon, but did not implead the first defendant as a respondent. The constitution of the appeal was impeached on the ground that the first defendant, a necessary party, had not been impleaded. An application was then made under O. 21, r. 20, but the learned Judges rejected it, holding that the first defendant, who was sought to be newly added was not " a person interested in the result of the appeal " within the meaning of the decision in *Subramanian Chetty* v. *Veerabhadran Chetty*[2] which they were prepared to follow. In the last mentioned case the learned Judges (Sir Arnold White, C. J. and Wallis, J.) explain that the section was inserted "to protect parties to the suit who had not been made respondents in the appeal from being prejudiced by modifications made behind their backs in the decree under appeal". Then, turning to the words " interested in the result of the appeal", the learned Judges observe that they imply that the party whom it is sought to bring on record must be shown to be interested in the result of the appeal

1. (1924) I.L.R. 2 Rang. 541.
2. (1908) 18 M.L.J. 452: I.L.R. 31 Mad. 442.
3. (1927) 54 M.L.J. 88: L.R. 55 I.A. 7: I.L.R. 6 Rang. 29 (P.C.).

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before he is brought on, for, "once he is brought on, he may be said to acquire an interest as a result of being brought on". Now, applying that test, it is perfectly clear that the Rangoon case the first defendant, whom it was sought to bring on the record newly, was not a person "interested in the result of the appeal". Supposing the appeal had gone on, and as a result, the sale in favour of the second defendant Singaram Chetty had been set aside by the appellate Court, how could it be said that the absent first defendant was "interested in the result of the appeal?". The decision of the High Court could not in the slightest degree affect the trial Court's finding (which had become *res judicata*), that as between the plaintiff and the first defendant the sale was perfectly valid. In that case, therefore, the first defendant had no possible interest in the result of the appeal; it mattered little to him whether it succeeded or failed. It is unnecessary to refer at any length to the facts of *Subramanian Chetty* v. *Veerabhadran Chetty*[1] but it will be seen that there, as in the Rangoon case, the parties newly sought to be added were not interested, in the result of the appeal, in other words, to them it was a matter of perfect indifference whether the appeal was allowed or rejected.

The test in each case therefore is, as put in the Madras case, would the parties not impleaded be prejudiced "by modifications made behind their backs in the decree under appeal?" Let that test be applied here. Supposing the appellate decree modifies the trial Court's decree by imposing a larger burden upon the third defendant, what happens? The sons are not directly affected by the appellate decree, they not being parties to it. That is undoubtedly so, but yet the result of any diminution of their father's assets will *ipso facto* be to diminish the extent of their own assets; in other words, in the language of *Subramanian Chetty* v. *Veerabhadran Chetty*[1] they will be "prejudiced by modifications made behind their backs in the decree under appeal". *Ma Than May* v. *Mohamed Eusoof*[2] upon which the third defendant's counsel relies, does not, if properly understood, help him.

There the second defendant, who was sought to be impleaded does not answer the description of a person "interested in the result of the appeal". He had obtained a

1. (1908) 18 M.L.J. 452: I.L.R. 31 Mad. 442.
2. (1931) I.L.R. 9 Rang. 624.

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certain right under the trial Court's decree and that right, whatever might happen to the appeal, could not have been affected by its result. Thus the actual decision in *Ma Than May* v. *Mohamed Eusoof*[1] does not conflict with the view we have taken. Granting therefore that the parties sought to be added are necessary, as distinguished from proper parties, we have no doubt whatever that O. 41, r. 20 applies.

A little reflection will show that Mr. Venkatarama Sastri's contention cannot be correct, for, as already observed, according to him no person against whom the right of appeal has become barred, can ever be added as a respondent under this provision. If this argument be sound, O. 41, r. 20 can never be brought into play; it must for all practical purposes remain a dead letter. It is difficult to conceive a case where the right of appeal does not become barred as against a party not impleaded, by the time the appeal comes on for hearing, for, under the rule be it noted, the action to be taken is at the hearing of the appeal.

Lastly, it remains to observe that the power given to the Court is discretionary under the rule in question. The point then is, in view of all the circumstances of the case, is the discretion to be exercised in favour of the appellant or not? In the first place, it is significant that although the fifth defendant had died about two years previous to the judgment under appeal, no one thought it necessary to bring his representatives on the record in the lower Court. So much for the fifth defendant. Now turning to the seventh, it is not a little strange that even in the decree passed by the lower Court in 1932, he was described as "minor male child not named". That was the way in which he was originally described in the plaint filed in 1919; he still remained in 1932 "a minor not named". That shows what little importance was attached to his presence on the record. Secondly, the same Advocate, curiously enough, represented in the lower Court the appellant and the seventh defendant, although their interests directly conflicted. Now turning to the eighth defendant (the fourth defendant's son), it is inexplicable how he came to be represented by the same Advocate as represented the twenty-seventh defendant. A glance at the decree will show how their interests conflicted. Our object in referring to these facts is

1. (1931) I.L.R. 9 Rang. 624.

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to point out that in the lower Court no one thought that the sons possessed any interest whatsoever which required a separate representation. Thirdly, as already observed, under the lower Court's judgment the sons had no separate entity, which fact might well have misled the appellant. Strong grounds exist therefore in our opinion to induce us to exercise our discretion in favour of the appellant.

The question then is, what is the proper order to make? The fifth defendant, as already observed, had died during the pendency of the suit in the lower Court. In this case, from the previous judgment of the High Court there was an appeal filed to the Privy Council by the ninth defendant with whom we are not concerned at this stage. In that appeal the fifth defendant's sons (two in number) were brought on the record as his legal representatives. It has been held in *Brij Indar Singh* v. *Kanshi Ram*[1] that the substitution of a new party for one stage of a suit is effective for all future stages of that suit; we may therefore regard the fifth defendant's sons as having been constructive parties to the suit in the lower Court. We learn that one of these two sons has since died: we therefore direct the surviving son of the fifth defendant, the seventh defendant and the eighth defendant to be added as respondents. Notice will issue to them immediately and the further hearing of the appeal is adjourned to the 30th March, 1937.

B. V. V. —— *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Palaniyandi Pillai and another .. *Appellants** (*Petitioners*)

v.

Rasappa Pillai .. *Respondent* (*1st Respondent*).

Palaniyandi Pillai *v.* Rasappa Pillai.

Civil Procedure Code (V of 1908), S. 144—Restitution—Application for—Form of restitution application—Whether must be of execution—Conformity to r. 11, O. 21, Civil Procedure Code—Whether necessary.

The Code of Civil Procedure does not prescribe the form of an application for restitution. There is no decision which enunciates what that form should be and there is still a conflict of opinion as to whether an application for restitution is an application for execution though no doubt our High Court has taken the view that an application for restitution must be an application for execution. But in none of the cases which have taken that

1. (1917) 33 M.L.J. 486: L.R. 44 I.A. 218: I.L.R. 45 Cal. 94 (P.C.).

* A. A. A. O. No. 170 of 1932. 17th August, 1936.

view is there any indication of the form in which that application should be made, and whether it should conform to all the requirements of O. 21, r. 11, Civil Procedure Code. It must also be noticed that the words 'according to the rules for the execution of the decree' which were in S. 583 of the old Code have been omitted in the new Code. This seems to indicate that an application for restitution may be made in such manner as the nature of each case might require and need not follow in every case the procedure in O. 21, r. 11, Civil Procedure Code.

Sarojebhushan Ghosh v. *Debendranath Ghosh*, (1931) I.L.R. 59 Cal. 337; *Parmeshar Singh* v. *Sitladin*, A. I. R. 1934 All. 626 (F.B.); *Unnamalai Ammal* v. *Arunachalam*, (1917) 33 M.L.J. 413 and *Sayad Hamidalli* v. *Ahmedalli*, (1920) I.L.R. 45 Bom. 1137, referred to.

The form of the execution petition would be unsuitable in most cases. The actual amount to be restored will have to be determined; the Court will have to determine whether it will have to grant interest and if so at what rate; and if it is restoration of immovable property the Court may have further to determine whether mesne profits have to be granted or not. It may be, conditions will have to be imposed upon the party who seeks restoration. After determination as aforesaid it will be then open to the Court to give the appropriate relief which the nature of the case may require and which may accord with such determination.

Pathak Bhaunath Singh v. *Thakur Kedar Nath Singh*, (1934) I.L.R. 13 Pat. 411 at 422 (F.B.), relied on.

Appeal against the order of the District Court of Salem dated the 12th March, 1932, in A.S. No. 47 of 1932 preferred against the order of the Court of the District Munsiff of Namakkal dated the 8th December, 1931, and made in E.A. No. 611 of 1931 in E.P. No. 299 of 1921 in O.S. No. 440 of 1917.

B. Sitarama Rao, E. Vinayaka Rao and *A. Rangachari* for Appellants.

C. S. Venkatachari and *V. N. Venkatavaradachari* for Respondent.

The Court delivered the following

JUDGMENT.—The question raised in this appeal is whether an application for restitution made by the appellants for recovery of a sum of money deposited by them into Court for setting aside a sale under O. 21, r. 89 of the Code of Civil Procedure is sustainable. The plaintiff-respondent in this appeal filed a suit O.S. No. 440 of 1917 to recover a certain annuity from and out of the property in the Schedule annexed to the plaint filed by him. The properties were owned by the third defendant from whom the first defendant purchased; and he in turn sold them to the second defendant. A decree was passed in the suit in favour of the plaintiff directing among other things payment of the amount by sale of the properties.

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Pending the suit the said properties appear to have been purchased by the appellants from the second defendant. In consequence of the said decree in the above suit the properties were brought to sale and purchased by the plaintiff-decree-holder. The appellant made an application to set aside the sale under O. 21, r. 89, Civil Procedure Code, by depositing the amount of the decree into Court and the sale was accordingly set aside. This was in or about June, 1921. Against the decree in the said O. S. No. 440 of 1917 an appeal was preferred by the defendants and the decree in favour of the plaintiff was reversed in A.S. No. 186 of 1920 on the file of the District Court, Salem. This was on the 2nd of November, 1921. In consequence of the said decision the appellants filed E.A. No. 74 of 1922 on the 12th January, 1922, for restitution of the monies they deposited into Court. The application was dismissed on the 4th April, 1922. But on appeal the said order was reversed and the appellants were declared entitled to restitution. This was in or about 7th April, 1924, and against this order C. M. S. A. No. 2 of 1925 was preferred to the High Court. Pending these proceedings against the decision in A. S. No. 186 of 1920, S. A. No. 276 of 1922 was preferred to the High Court by the plaintiff. On 12th February, 1925, the High Court reversed the decree of the appellate Court in A.S. No. 186 of 1920 and restored the decree in O.S. No. 440 of 1917. Against this decree a Letters Patent Appeal was preferred being L. P. A. No. 98 of 1925 on the file of the High Court, and on 29th November, 1927, the Letters Patent Appeal was allowed and the result of the decision therein was that the decree of the appellate Court in A. S. No. 186 of 1920 was restored and the plaintiff's suit dismissed. It may also be stated that the C.M.S.A. No. 2 of 1925 was also disposed of and the same was dismissed on the same date. On the 19th November, 1928, the decree in the Letters Patent Appeal was amended as the cause-title was found to be defective in that the names of the legal representatives of the first defendant's representative were not in the cause-title of the decree as drafted but the name of the first defendant, a dead man, was retained in the decree as originally drafted. Within three years from this date the appellants filed E.A. No. 611 of 1931 claiming restitution of the amount deposited by them with interest. They prayed that the Court may be pleased to grant restitution and direct the plaintiff-

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respondent to pay the petitioner the amount with subsequent interest. The District Munsiff dismissed the application on the ground that the application is unsustainable in that there was already an order for restitution made in E.A. No. 74 of 1922 and the same prayer cannot be asked for again, and further that there was "no prayer for execution". On appeal from this decision the learned District Judge summarily dismissed the appeal on the ground that an order for restitution had already been made and it is an executable order and further the Court must be moved in the appropriate way, and that is, by an execution petition. Against this order the present second appeal has been preferred.

It is contended by Mr. Sitarama Rao that both the lower Courts were wrong in the view they took, namely, that the appellants should have executed the order for restitution passed in E. A. No. 74 of 1922. It seems to me that Mr. Sitarama Rao is right in his contention. E.A. No. 74 of 1922 was filed by virtue of the decision in A. S. No. 186 of 1920. But the decision was upset in S. A. No. 276 of 1922. The result of the decision in the second appeal was that the appellants could not maintain successfully E.A. No. 74 of 1922 and the application must be deemed to have become infructuous. Till the decision in the Letters Patent Appeal established the rights of the defendants 1 and 2 the appellants could not have applied for restitution at all. It is only in consequence of the decree in the Letters Patent Appeal that their right to apply accrued. The appellants were therefore in order in filing the present application for restitution.

The next contention is whether the appropriate way of moving the Court was by an execution petition and not in the form of an application in the manner filed by the plaintiffs. The argument seriously pressed on behalf of the plaintiff-respondent in this case which apparently prevailed in the Courts below is this:—In a series of cases by which I am bound our High Court has consistently taken the view that an application for restitution is an application in execution of a decree and governed by Art. 182 of the Limitation Act. The only way in which an application can be made is by way of an execution petition framed in accordance with O. 21, r. 11, Civil Procedure Code. The present petition does not fulfill the requirements of O. 21, r. 11, Civil Procedure Code, and it is defec-

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tive in a material particular as it does not state in what way the assistance of the Court is sought, whether by arrest of the plaintiff or attachment of his properties, and the application was rightly rejected by both the Courts. It is no doubt true that our High Court has taken the view that an application for restitution is an application for execution of the decree whatever may be the view of the other High Courts, and though there is much to be said in favour of the other view. (Vide *Sarojebhushan Ghosh* v. *Debendranath Ghosh*[1], *Parmeshar Singh* v. *Sitladin*[2].) The ground on which the application is said to be for execution of the decree is thus stated in *Unnamalai Ammal* v. *Arunachalam*[3]:

> " What is sought to be enforced is the legal obligation arising from the decree itself and not an independent obligation. It seems to us that we must treat the application as an application for execution of the decree".

And this also accords with the view taken by the Bombay High Court in *Sayad Hamidalli* v. *Ahmedalli*[4] where Sir Norman Macleod, C.J., says:

> " It is the decree of the appellate Court which entitles the successful appellant to get back something which he had been deprived of by the decree of the lower Court, under which the then successful party had actually received possession. In order, therefore, to get back what he has lost, the successful appellant must apply for execution of the order which entitles him to get back that possession".

But it is too much to argue from this that the application for restitution must strictly conform to the form prescribed for an execution petition and satisfy all the requirements of O. 21, r. 11, Civil Procedure Code. It will be seen that under S. 144 before an order for restitution can be made the form and the manner of restitution and the relief which the Court would grant for giving the benefit of the decree to the person who seeks the restitution of the property which he has been deprived of, have to be determined by the Court. In my opinion the form of an execution petition would be unsuitable in most cases. The actual amount to be restored will have to be determined; the Court will have to determine whether it will grant interest and, if so, at what rate; and if it is restoration of immovable property the Court may have further to determine whether mesne profits have to be granted or not. It may be, conditions will have to be imposed upon the party who

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1. (1931) I.L.R. 59 Cal. 337.
2. A.I.R. 1934 All. 626 (F.B.).
3. (1917) 33 M.L.J. 413 at 414.
4. (1920) I.L.R. 45 Bom. 1137 at 1140.

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seeks restoration. After determination as aforesaid it will be then open to the Court to give the appropriate relief which the nature of the case may require and which may accord with such determination. In meeting the view that an application for restitution could not in the nature of things be an application for execution because the form of an execution petition could not be appropriately thought of for an application for restitution, Courtney Terrell, C.J., observes in *Pathak Bhaunath Singh* v. *Thakur Kedar Nath Singh*[1] thus:—

" It is true that the procedure for dealing with them differs in some respects from the procedure for carrying out other decrees of the Court notably in the fact that such applications must be made in the Court of first instance. But such matters are not, in my opinion, the criteria of the nature of the remedy for judicial classification any more than geographical habitat or nomenclature are criteria of zoological genus. Under S. 144 the Court is bound as a matter of law to order restitution though the form of restitution may vary and it is by reason of the fact that the Court of first instance only is familiar with the circumstances of the case that as a matter of machinery it alone is given discretion to determine the form which the restitution may take. This fact does not, in my opinion, militate against the view that an application for restitution is an application in execution . . . . . . The re-arrangement in the new Code has, in my opinion, not affected the essential nature of the remedy which remains as before a remedy in execution though subject to a special procedure".

These observations clearly indicate that an application for restitution need not be by an execution petition as required by O. 21, r. 11, Civil Procedure Code.

Mr. Sitarama Rao urges before me that even if the application is considered to be defective he can be given leave to amend the petition by adding a prayer for appropriate relief. Having regard to the circumstances of the case I think this is an eminently fit case in which I should grant him that relief. The Code of Civil Procedure does not prescribe the form of an application for restitution. There is no decision which enunciates what that form should be and there is still a conflict of opinion as to whether an application for restitution is an application for execution though no doubt our High Court has taken the view that an application for restitution must be an application for execution. But in none of the cases which have taken that view is there any indication of the form in which the application should be made, and whether it should conform to all the requirements of O. 21, r. 11, Civil Procedure Code. It must also be noticed that the words,

1. (1934) I.L.R. 13 Pat. 411 at 422 and 423 (F.B.).

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"according to the rules for the execution of the decree" which were in S. 583 of the old Code have been omitted in the new Code. This seems to indicate that an application for restitution may be made in such manner as the nature of each case might require and need not follow in every case the procedure in O. 21, r. 11, Civil Procedure Code.

It is seriously contended by Mr. Venkatavaradachariar that I ought not in second appeal allow the amendment as in spite of the objection in the counter-affidavit the appellants have not chosen to amend the petition. But in the view both the lower Courts have taken, namely, that as there was an order in E. A. No. 74 of 1922 this application would not lie, an application for amendment would be of no avail.

I therefore give leave to the appellant to make the necessary amendments in regard to the mode in which the assistance of the Court is required within one month from the date of the receipt of this order in the lower Court. In the result the appeal is allowed and the application remitted to the District Munsiff's Court of Namakkal for disposal according to law but in the circumstances I make the appellants pay the respondent the costs of these proceedings throughout. Leave refused.

K. C. ——— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD ROCHE, SIR SHADI LAL AND SIR GEORGE RANKIN.

Nutbehari Das .. *Appellant**

v.

Nanilal Das and others .. *Respondents.*

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Hindu Law—Joint family property—Self-acquisition—Mixing of funds—Evidence of blending—Common bank account—Inference of intention to make it joint family property—Practice—Suit for partition—Pleas of parties—Disclaimer by party of particular case—Court whether can consider new case—Erection of buildings by one co-sharer—Mode of adjusting rights.

Where the *karta* of a joint family mixes his own monies with family monies the mere fact of a common till, or a common bank account, does not of itself effect any blending, so long as accounts are kept. In a partition suit between the members of a Dayabhaga joint family the parties being an

* P. C. Appeal No. 68 of 1935. Bengal Appeal No. 13 of 1934. 28th January, 1937.

uncle, *A*, and three sons of his deceased brother, one of whom was in a contract business, the nephews contended that *A* and their father, had inherited certain joint property and by their joint labour had added thereto, both being owners of a contract and money-lending business, that the two brothers and their families had lived jointly, the uncle acting as *karta*, receiving the profits of all the joint family businesses and other income, and investing the family savings, sometimes in his own name and sometimes in the name of the eldest of his nephews. In support of their contention that the property was the property of the joint family, they produced two books of the contract business of one of the nephews for the year 1916, which purported to show that during that year a certain sum of money received by him for work done was paid into his uncle's hands, and another amount paid back to him leaving a balance due to him. The uncle stated in his evidence that no such books were kept in his firm.

Held, that assuming the books of account were genuine, they did not constitute evidence of blending and that it was not made out that the uncle and nephew blended their funds, still less that they presented the blend to the joint family. The effect of the evidence was merely that the nephew was letting his uncle, who financed him, to act as banker or cashier.

Suraj Narain v. *Ratan Lal*, (1917) 33 M.L.J. 180: L.R. 44 I.A. 201: I.L.R. 40 All. 159 (P.C.) and *Periakaruppan Chetty* v. *Arunachalam Chetty*, (1926) 52 M.L.J. 571: I.L.R. 50 Mad. 582, referred to.

Where on a disputed and complicated question of fact, embarrassed by defect of materials and by not a little false swearing, the parties claiming partition do not make a particular type of case, the party resisting partition should not be troubled with it, whether it be new or not. If it be disclaimed by the party, the disclaimer itself is strong evidence on the other side; if it be both new and disclaimed, the party who has had no chance to meet it cannot be told that the state of the evidence makes it useless to give him a chance, unless the circumstances are highly exceptional and the conclusions exceptionally clear.

In a suit for partition the most ordinary method when one co-sharer has put up buildings on the land is to allot to him for his share a portion of the land which contains his holding. When this cannot be done or would not be fair it may nevertheless be unreasonable and unnecessary to treat such co-sharer exactly as the others.

Decision of the Calcutta High Court reversed.

Appeal from a decree of the High Court of Judicature at Fort William in Bengal dated the 17th April, 1934, in effect reversing a decree of the Subordinate Judge, 4th Court, 24 Parganas, dated the 29th July, 1930.

A.M. Dunne, K.C. and *W. Wallach* for Appellant.—The High Court whilst agreeing with the trial Judge that the contract business of 1906 was the separate property of the appellant erred in holding that there was blending of the income of the said business with the earnings of the other members of the family; and that the properties of which partition has been decreed were acquired with such amalgamated funds. No case of blending was made on behalf of the respondents either in the pleadings, issues or otherwise. Such a case was expressly repudiated by them, and was entirely

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inconsistent with the case made in the pleadings by the plaintiff and the defendants his brothers. There could not be any joint family property as claimed, inasmuch as there was no common stock into which the separate acquisitions of the appellant could be thrown. The fact that the appellant had supported his poorer brother and nephews from his separate earnings and property is not and ought not to have been treated as evidence of his having converted his self-acquisitions into joint family property. Refers to Mulla's Hindu Law, 1936, 8th Edition, p. 247, para. 227; p. 329, para. 286; *Lal Bahadur* v. *Kanhaiya Lal*[1], *Suraj Narain* v. *Ratan Lal*[2], *Radha Kant Lal* v. *Mussammat Nazma Begum*[3], *Rajanikanta Pal* v. *Jagmohan Pal*[4] and *Shiba Prasad Singh* v. *Prayag Kumari Debi*[5].

Leslie De Gruyther, K.C. and *Sir T.J. Strangman* for Respondents.—Even assuming that there was no nucleus, there was a fund and with that fund they all lived together, and they were therefore joint. In 1913 separate contract business was started by one of the nephews Manmatha, and there is evidence that the earnings from the business were blended with the earnings of the uncle. This separate business is said by Manmatha to be joint family business. The immovable properties were purchased from this mixed up fund and such properties which stood either in the name of Manmatha or his uncle, Nutbehari, must be treated as joint. The case of blending is no new case. It was submitted for consideration to the Court below and evidence has been directed to this question.

Sir T. J. Strangman followed.

28th January, 1937. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—This appeal arises out of a partition suit between members of a Bengali family governed by the Dayabhaga. The contest is between uncle and nephews—that is between the appellant Nutbehari, who was the first defendant in the suit, and the three respondents, sons of his deceased brother Haridas, namely, Nanilal (the plaintiff), Manmatha (second defendant) and Nagendra Nath (third defendant). These three brothers make common cause against Nutbehari. As McNair, J., has noticed:—

"The real protagonists are Nutbehari and his nephew Manmatha Nath,

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1. (1907) 17 M.L.J. 228: L.R. 34 I.A. 65: I.L.R. 29 All. 244 (P.C.).
2. (1917) 33 M.L.J. 180: L.R. 44 I.A. 201: I.L.R. 40 All. 159 (P.C.).
3. (1917) 35 M.L.J. 99: I L R. 45 Cal. 733 (P.C.).
4. (1923) 44 M.L.J. 561: L.R. 50 I.A. 173: I.L.R. 50 Cal. 439 (P.C.).
5. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331 at 349: I.L.R. 59 Cal. 1399 (P.C.).

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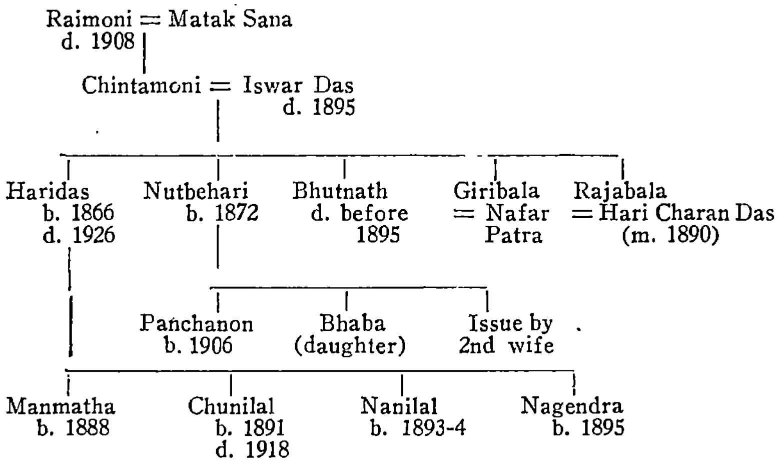
who are admittedly contractors in a large way of business. Manmatha, although he is not the plaintiff, admits that he is financing the suit."

The trial Judge (Subordinate Judge, 4th Court, 24 Perganas) dismissed the suit save as regards a small plot of land measuring about 3 bighas and 4 cottas, upon which the family had been living: this land, but not the house built thereon, he treated as joint property of the parties, though he refused to divide it by metes and bounds. By way of partition he directed that it should be valued and that on the uncle, Nutbehari, paying one-half of the value for division between the nephews, he should retain the whole of the land for himself. The High Court at Calcutta (Mitter and McNair, JJ.) reversed this decision and gave decree for partition of a large number of immovable properties and movables, as well as of a grocery business or modi shop. In agreement, however, with the Trial Court the High Court dismissed the claim for partition so far as regards two contract businesses and a money-lending business. It also dismissed the claim for accounts.



Concurrent findings by the Courts in India have displaced the case made by the respondents on the pleadings and the learned Judges of the High Court have deliberately decided to give effect to a case which the respondents by their memorandum of appeal had expressly disclaimed.

The claim made by the respondents upon their pleadings and by the evidence which they adduced was to the effect that Haridas and Nutbehari had inherited from their father Iswar a certain amount of property which formed the nucleus of their joint property and by their joint labour had added

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thereto; both of them being owners of a contracting business begun in 1906 in the name of Nutbehari in partnership with a stranger to the family called Haricharan Das, son of Dinu Das Mistry: both being owners also of a second contracting business begun in 1913 in the name of Manmatha, of a money-lending business in Nutbehari's name, and of a modi shop carried on in a part of the dwelling house of the parties: that the two brothers and their families all lived jointly on the land inherited from Iswar, Nutbehari acting as the karta, receiving the profits of all the joint family businesses and other income, investing the family savings sometimes in his own name and sometimes in that of Manmatha, building masonry structures on the family homestead, and on other lands which were let to tenants—generally, but not always, in Nutbehari's name. This case the trial Court rejected root and branch, and in the High Court the very outline of this case has been disbelieved. In agreement with the trial Judge, Mitter and McNair, JJ., in separate but concurring judgments have held that Iswar left no property, that Nutbehari and Haridas had no nucleus of ancestral property, that the contract business begun in 1906 was Nutbehari's alone, and that of 1913 was Manmatha's, having been started for him and given to him by Nutbehari; that Nutbehari did not act as karta; that the money-lending done in his name was done on his separate account; and that the land at Mudiali and the house built thereon by Nutbehari are his separate property. The learned Judges of the High Court have, however, held that all the other immovable properties acquired either in Nutbehari's or Manmatha's name (Sch. *Ka* to the plaint as amended) and all the movables in Sch. *Kha* are joint family property of the parties. This they have held on the strength of an argument which each learned Judge has separately stated. McNair, J., puts it thus:—

"That Nutbehari acquired certain properties which would in the ordinary course of events be his own self-acquired properties and handed them over to the joint family and later blended with them other self-acquired properties; so that in the result the mixed properties assumed the condition of joint family property".

This argument the learned Judge admits not to be the case made in the plaint, not to have been considered by the trial Judge, and to have been expressly disclaimed by the present respondents before the High Court. He observes, however,

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that "there is no suggestion that any further evidence could or would be produced if the doctrine of blending had been specifically set up".

Mitter, J., puts the argument by saying:—

"That the defendant No. 1 blended the earnings of defendant No. 2 out of his business with his own separate account and the effect of such blending was to cause the income from the two businesses to become joint to the extent that any immovable properties which were purchased from such mixed fund was meant to be joint property of both brothers Nutbehari and Haridas".

And in another passage the same learned Judge states his conclusion thus:—

"That Nutbehari mixed up his own earnings with Manmatha's earnings and by blending his self-acquisition with the joint family business which Manmatha says his business was, and that the properties purchased from such joint fund were joint family properties of defendant No. 1 and his brother".

Though it appears from his judgment that on the hearing of the appeal this case had been expressly disclaimed in argument by the Advocate-General on behalf of Manmatha, Mitter, J., did not consider that it was a new case and referred to a passage in the written statement of Manmatha (para. 11) which averred in effect that receipts from the 1913 contract business, like all other joint family receipts, came to the hands of Nutbehari as the karta. With great respect to the learned Judges it is difficult to feel complete confidence in this method of approach. If on a disputed and complicated question of fact embarrassed by defect of materials and by not a little false swearing, the parties claiming partition do not make a particular type of case, it is not easy to see why the party resisting partition should be troubled with it, whether it be new or not. If it be disclaimed, the disclaimer itself is strong evidence on the other side. But if it be both new and disclaimed, can the party who has had no chance to meet it be told that the state of the evidence makes it useless to give him a chance? Not, it would seem, unless the circumstances are highly exceptional and the conclusions exceptionally clear.

Their Lordships will now set forth the main facts which they hold to be established as regards the history and transactions of the family. The pedigree prefixed to this judgment is not complete, nor are all the dates therein given precise, but it exhibits the main facts about the family of Iswar Das so far as they are necessary for the present case.

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Iswar was all his life a poor labouring man. Whether he is more accurately described as a riveter or as a riveter's labourer, as a skilled or an unskilled labourer, he and his family managed with difficulty to earn their living. They lived in huts of which the walls were made of mud and bamboo and the roof thatched with leaves. Before 1894 they had moved from one plot of land to another several times. Haridas, the eldest son, got a little education. Nutbehari, the second son, got none and is even now illiterate: at nine years old he began to earn his living as a punkha puller at a pay of two annas per day. Iswar's mother-in-law, Raimoni, however, made a little money as a vendor of fried rice to workpeople, and in 1894 a plot of 3 bighas 4 cottas at Fatehpur was purchased by her for Rs. 387 and has ever since been the family homestead (bastu). It was really two plots, one of 2 b. 14 c. and the other of 10 c. and the interest purchased was a permanent tenure at a fixed rent of Rs. 8 per annum. In 1895, when Nutbehari was 23 years old, Iswar died in debt. Haridas, who was five or six years older than his brother, may have been still in work as a riveter at a wage of 8 or 10 annas per day or he may have given it up for lighter employment. Nutbehari had become a mate mistry earning Rs. 1-8-0 per day. The family of Haridas was fairly large and they were having so hard a struggle that the three boys were put to work in a cotton mill at a very early age. In 1898 Haridas took a "ticca" tenancy or cultivating lease for three years of 2½ bighas of land, really garden land, near to the homestead at an annual rental of Rs. 9. The unregistered deed [Exh. AA (1)] mentions no salami. In 1902 Raimoni mortgaged the homestead land for Rs. 485 and bought a plot of 3 bighas to the east of the homestead in the name of her daughter Chintamoni. By this time—namely, from about 1900—Nutbehari's earnings had become more substantial. He had proved himself a capable workman and was now entrusted with the execution of various works required by a steamer company to be done outside Calcutta. He went to Balasore, Sonachara, Barisal and Chandpur, returning at the end of each job with some hundreds of rupees. By 1904 the mortgage of 1902 was paid off and Nutbehari's money was used to erect masonry structures on the homestead. He was maintaining his own and his brother's family. On 18th December, 1904, one Dwarkanath Adak executed an unregistered document granting a "ticca" tenancy in the names

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of Haridas and Nutbehari (Ex. AA-2) of some garden land in Fatehpur—being 2 bighas, 12 cottas less the area of two tanks excluded from the lease. Whether this was taken in Nutbehari's absence and whether on his objecting to it the lease was surrendered is a controversy that need not now be decided. No salami is mentioned in the document and though the term is five years there is a provision for determination at any time on payment for the vegetables, etc.

In 1906 Nutbehari became a contractor under the steamer company before-mentioned in partnership with one Hari Charan Das, a son of Dinu Das, his old employer. Haridas and his family had no share whatever in this business and no one of them except Manmatha ever worked in the business. The registered partnership deed between Nutbehari and Hari Charan is in evidence (Ex. F). Each was to have a half share: Nutbehari was to have a monthly salary of Rs. 30 and Hari Charan was to supply the funds at 15 per cent. interest. For the benefit of the sons of Haridas, other than Manmatha, Nutbehari soon afterwards set up a grocer's (modi) shop in one of the buildings on the homestead and Chuni was put in charge. This business was Nutbehari's, he was liable for its debts and apparently he found capital for it three times at least. When Chuni died in 1917 Nanilal (the plaintiff) was put in charge. The profits were not enormous at any time but Nutbehari let his nephews have the profits. In 1906 Nutbehari bought for Rs. 292 the permanent right in the garden land which had been rented by the lease of 1898 in the name of Haridas. In 1907 he bought for Rs. 2,500 the permanent right in the land of the tenancy of 1904 including, however, the two tanks which had been previously excluded. This land was thereafter let out by him in his own name for residential purposes to tenants whose kabulyats, etc., are in evidence. Notwithstanding opinions expressed by the High Court their Lordships can discover no ground for supposing that because he bought the mokarari interest in the lands of the ticca leases of 1898 and 1904 he was doing so on joint account presenting Haridas with a half share in the corpus which at any moment he could take away by partition. Even if it be taken that the lease of 1904 was subsisting in 1907, that it had really been taken on joint account, and that Nutbehari's main object in buying the tenure was to have some land for Haridas to cultivate and some

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tanks for Haridas to fish, the inference of jointness remains unjustified. In 1908 Raimoni died and her daughter Chintamoni succeeded to her stridhan property. In 1909 Nutbehari bought two small plots ($1\frac{1}{2}$ bighas and 10 cottas) of hogal (reed-bearing) land near the homestead, and in 1910 a further plot of 7 cottas, 6 chittahs adjacent thereto. From this period onwards at frequent intervals Nutbehari was investing his money in land of the immediate neighbourhood. Several reasons combine to explain this course which was a very natural one. He was also adding to the dwelling house. On 8th April, 1911, Chintamoni executed a registered deed releasing to Haridas and Nutbehari the original land (3 bighas, 4 cottas) which Raimoni had bought in 1894. On the same day Chintamoni executed a deed of gift of the 3 bighas to the east thereof which had been bought in her name in 1902 in favour of Panchanon, Nutbehari's son, whose mother had recently died (1909). Haridas and Nutbehari joined in the deed as consenting to the gift. It should here be noted that Nutbehari had married a second time soon after his first wife's death, and by his second wife has a family of two sons and a daughter—a fact which should be considered before imputing to Nutbehari an intention to part with a half share of his self-acquired properties to Haridas.

1913 was a critical year in the history of this family. Nutbehari's partner, Hari Charan, retired from the contract business which had begun in 1906 leaving Nutbehari as sole owner. In this year Nutbehari received an offer which led the steamer company, for whom he had been carrying out contracts, to allow him to start another contract business. This he did on 10th December, 1913, in the name of Manmatha, who had for some years been working for him at an ordinary wage. Nutbehari found the money necessary to start the new business, he supervised its beginnings and the promised contracts were forthcoming. In this way he provided for Manmatha who became sole owner of a successful and profitable business, though not so lucrative as Nutbehari's own. Their Lordships think it desirable to examine this matter somewhat more closely. In a passage already quoted Mitter, J., speaks of Nutbehari blending his self-acquisitions "with the joint family business which Manmatha says his business was." Now the case and the evidence of Manmatha and the plaintiff was that the 1913 business, though in Manmatha's name, belonged

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really—like the original business of 1906—to the joint family of Haridas and Nutbehari. This story has been rightly negatived by concurrent findings of the Indian Courts. But, that story gone, there is no case left on which the business of 1913 can be supposed to be now, or ever to have been, owned by a joint family. It was the separate property of Manmatha. After the death of Haridas in 1926 Manmatha and his brothers may well have been joint since their father left some land and money if only a little. But the 1913 business was no asset of Haridas. The gift of a paternal uncle is not even ancestral property and this was not really a case of gift of property. What Nutbehari had done was to arrange for contracts, lend some money, and supervise and direct for a time the work on Manmatha's behalf. The profits of the new business were Manmatha's self-acquisitions. It is not easy to see why a separate business should have been started if in the end the profits of both businesses were to be so mixed that all investments of either owner can safely be taken to have been made on joint account. But if that be made out in this case, it gives no right whatever to the plaintiff Nanilal nor could Manmatha prosecute his rights thereunder in this partition suit. This may account for a certain nervousness on the part of the Advocate-General in reference to the case which found favour with the learned Judges.

From 1913 to 1927 both businesses prospered, but the oral evidence as to the conduct of the parties and their dealings with the profits is conflicting and partisan. What is certain is that a number of properties were purchased in the name of Nutbehari and a smaller number in Manmatha's name.

The list given below is not exhaustive nor can it readily be related to the particular items of Sch. *ka* of the plaint, but it shows the dates on which purchases were made:—

	Nutbehari	*Manmatha*
9th Nov., 1914 ..	3 c., 5 ch. from Molla ..	—
7th Mar., 1915 ..	2 b., 14 c., 10 ch. Fakir Naskar ..	—
11th Oct., 1915 ..	12 c., 10 ch. Bejoy Hasra ..	7 c., 10 ch. from Bejoy Hasra.
21st Dec., 1915 ..	—	1 c., 10 ch. from Idris Gasi.
26th May, 1916 ..	13 c. Aghore Ghosh ..	—
29th Sept., 1916 ..	—	3½ b. from Umasastri.
13th May, 1917 ..	1 b., 15 c. Banerjee ..	—
27th April, 1918 ..	A. Patra ..	—

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		Nutbehari		Manmatha
26th Feb., 1920	..	1 b., 10 c. Nirmala	..	—
27th July, 1920	..	—		5 c. from Nandarani.
4th Oct., 1921	..	M. N. Patra	..	—
1922-22	..	Howrah land	..	—
10th Feb., 1926	..	—		Land at Jorehat from Nafar Das.

The plaintiff and Manmatha say that all the properties are joint. Nutbehari says that he owns the properties which stand in his name and those which stand in Manmatha's name are Manmatha's. The evidence of Manmatha at the trial was that all purchases had been made by Nutbehari and that he (Manmatha) was not even aware of any of the purchases effected in his name save that from Umasashi. The trial Judge made an elaborate examination of each purchase in Manmatha's name and discredited this story; holding that Manmatha's transactions had been done by himself on his own account—including both purchase, sale, and exchange of properties, moneylending on promissory notes, purchase of shares, obtaining of decrees, ornaments and the making of separate income-tax returns. The High Court, moreover, found that the land and house built thereon at Mudiali were the sole property of Nutbehari and that his moneylending business was his own. Mitter, J., gives as his reason:—

"There was plenty of money in the hands of Nutbehari which he might have disposed as he liked and which he need not have incorporated in the joint fund."

Notwithstanding these circumstances, the High Court have held it proved that (save for the Mudiali house and land) all the immovables standing in either name are joint family property—that is property of a Dayabhaga joint family in which till 1926 the co-sharers were Haridas and Nutbehari and after 1926 were Nutbehari and his nephews. The evidence on which the High Court proceeded must now be examined.

The books of account of the two contract businesses ought, of course, to make impossible the dispute which has occupied the Courts in this case. When first the quarrel broke out, namely, in August, 1927, books of account both old and current were in the dwelling house at Fatehpur. Whether Nutbehari is concealing important books of his own business or whether his nephews have taken possession of them and suppress them is a question which Mitter, J., found it difficult to decide. Books purporting to be Pay (Mahina Khasra)

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books of Manmatha's business (Exh. a Series) were produced on his behalf but have been discarded by both Courts on the ground that they contain false entries fabricated for the purposes of this case. As part of the original case that both contract businesses belonged to the joint family of which Nutbehari was *karta*, the oral evidence and the false entries were to the effect that all monies of both businesses went into Nutbehari's hands. Nutbehari countered with a round denial: no such thing ever happened: all monies were kept separately by each. No books of the 1913 business, showing payment to Nutbehari in the usual course, have heen produced, but Manmatha and his brothers produce as evidence two books of Nutbehari's contract business called Jabda and Khatian. These are in effect books for the year 1916 only and they purport to show that during that year over Rs. 15,000 of Manmatha's money, received by him for work done, was paid into Nutbehari's hands and some Rs. 12,000 paid back to Manmatha, leaving a balance due to him of Rs. 2,824. Nutbehari in his evidence declared that no such books were kept in his firm. This seems to be untrue and though the entries now relied upon are open to considerable criticism according to McNair, J., their Lordships will assume that the books are genuine and prove the facts of these payments and repayments. What is the effect, save that Nutbehari's evidence, like that of his nephews, is unreliable and that in the third year of the new business of this workman turned contractor he was very sensibly letting his uncle, who financed him, act as his banker or cashier? This is no evidence of "blending." So far as it goes it is evidence the other way. Even in the case of a karta mixing his own monies with family monies the mere fact of a common till, or a common bank account, need of itself effect no blending so long as accounts are kept. This can be seen from a careful examination of Lord Buckmaster's judgment in *Suraj Narain* v. *Ratan Lal*[1] and a more explicit statement will be found in the judgment of Reilly, J., in *Periakaruppan Chetty* v. *Arunachalam Chetty*[2]. It is odd that the two books for this short period only, and no similar books for other years, should have been obtained by the respondents. No proof is offered that a single pice of the outstanding balance was not repaid or accounted for, nor is the purchase

1. (1917) 33 M.L.J. 180: L.R. 44 I.A. 201: I.L.R. 40 All. 159 (P.C.).
2. (1926) 52 M.L.J. 571: I.L.R. 50 Mad. 582 at 591-2.

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of any land traced directly or indirectly to any balance of Manmatha's money. Nor are there any books of Manmatha's to show that he did, or that he did not, provide the price in any single instance. Nor do the Jabda or Khatian show that Manmatha's money was going towards general expenses of a joint family. So far therefore as account books are concerned it is not made out that uncle and nephew blended their funds: still less that they presented the blend to the joint family.

Great reliance was, however, placed on an admission made by Nutbehari in 1924 when giving evidence for Manmatha and others who had in 1916 purchased certain hogal land near to the homestead at Fatehpur from a widow called Umasashi. The transaction was attacked as invalid and both Nutbehari, Manmatha and the sircar Sashi Koer gave evidence at the trial before the Subordinate Judge. At first Nutbehari had intended to buy these lands and had paid Rs. 100 as earnest money and executed an agreement for sale (bainapatra). In the end it was bought in three parts by Manmatha, Hari Charan Das and Asutosh Hasra, who paid Rs. 1,260, 800 and 630 respectively—total Rs. 2,690. Manmatha's evidence was:—

"My paternal uncle Nutbehari paid the earnest money on his own behalf intending to purchase the property himself. But eventually he did not purchase it. He said 'I have no need of the property.' I requested Nutbehari to let me purchase the property".

In cross-examination:—

"My father is alive. I have got an uncle too, whose name is Nutbehari. My father and my uncle live in joint mess. I too live with them in joint mess in the same bari. . . . After my purchase I have kept the land in my khas possession. My uncle Nutbehari's lands are on three sides of it".

Sashi Bhusan Kuar said:—

"The purchase was made with Manmatha's money and the property belongs to him".

Nutbehari said:—

"I paid Rs. 100 as earnest money. I did not, however, buy the lands. . . . I had paid earnest money without seeing the lands. When I found that the lands were scattered and were not contiguous to my lands I gave up the idea of buying them. The price settled seemed also to be a bit too high and this was another reason for my backing out".

In cross-examination comes the passage now particularly stressed:—

"I am illiterate and cannot even sign my name. . . . My nephew Manmatha lives with me in joint mess and our properties too are joint except the property in suit. Manmatha has purchased one or two properties himself. I told Manmatha that the price of the lands in suit seemed to be too high

But he said that he would not grudge paying a higher price as the hogal land in suit was contiguous to our hogal lands. These hogal lands are the ejmali property of Manmatha and myself".

This language is the Judge's note in English of the effect of the witnesses' answers to questions—put and answered, presumably, in Bengali. Mitter, J., takes it as proof that *all* Nutbehari's properties were joint with Manmatha and then interprets that as meaning joint not with Manmatha but with Haridas under the Dayabhaga school of law. This he supports by taking against Nutbehari his explanation given in the present case:—

"I then said of our properties, except that of that suit, being joint with Manmatha, having in view only the properties covered by mother's deed of release and the kobala executed by the Hasras"—

the former reference being to Chintamoni's deed of 1911 and the latter reference being to a sale of hogal lands dated 11th October, 1915, whereby 12 cottas, 10 chittahs was conveyed to Nutbehari and 7 cottas, 10 chittahs to Manmatha for a lump price of Rs. 467-4-0 by the same deed. Manmatha in the present case says:—

"Uncle had paid earnest money for the land of Umasashi in order to purchase the entire land for our entire family".

which contradicts his evidence in the previous case. Sashi Bhusan likewise contradicts himself, now saying that Nutbehari paid the money on the purchase in Manmatha's name. McNair, J., has noticed that so far back as 1916 the 7 cottas, 10 chittahs purchased in Manmatha's name in October, 1915, had been exchanged by Manmatha for other land with certain brothers named Rakshit: he does not think therefore that that land can have been in Nutbehari's mind when he deposed as he did in 1924. It is more than probable that in 1930 Nutbehari had no real recollection of what he had said or what he had meant in 1924. But it is clear that in 1916 each was taking his own way as regards Umasashi's land, and that as the Subordinate Judge held [Order No. 27, 6th February, 1928], "from the deposition of Manmatha it is quite clear that he did not claim Nutbehari's land." But for Manmatha's deposition their Lordships would incline to agree with McNair, J., that Nutbehari's evidence showed that some of the hogal lands near to the homestead [perhaps those bought by Ex. P (1) of 1917 or A. (9) of 1920] were ejmali between Nutbehari and Manmatha. But the evidence must be taken fairly and as a whole and it is most noticeable that each

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party makes clear that the other has lands of his own. No doubt on his own case Nutbehari should have said "I am joint with his father as to the homestead and lands nearby belong to both of us but in separate plots. Also each of us has other property." But the Judge's translation of the effect of an illiterate man's answer to a pleader's questions in cross-examination is a product of several factors and in this case it is not so different from his present case that it can be regarded as disproof. In any case the conclusion that the lands of both deponents (Umasashi's land excepted) belonged to the joint family, cannot in their Lordships' view be drawn.

As the oral evidence for the respondents cannot possibly be relied upon, it only remains to notice certain documents which are said to throw doubt upon the case that the purchases of uncle and nephew were made by each on his separate account. In their Lordships' view these come to very little. The deed of 11th October, 1915, has already been referred to whereby two brothers Hasra, inhabitants of Fatehpur, sold for Rs. 467-4-0 two plots of land—one to Nutbehari and one to Manmatha. This proves little enough, but it proves even less if it be coupled with the fact that, when Manmatha in 1916 exchanged his plot for adjacent land with the Rakshits, the deed (Ex. N) recited that he had been owning and possessing the same since the purchase from the Hasras "without any share therein being owned by anyone else in respect thereof and without any right or concern on the part of anyone else." It is possible to have too great belief in the truth of recitals in deeds, but these transactions were with neighbours, close neighbours who could hardly have failed to know of the jointness of Nutbehari with Haridas or Manmatha if there be any truth in the respondents' case. Again Ex. A-20 is a registered kobala whereby certain Muslims called Gasi transferred to Manmatha on 21st December, 1915, a one-third share of 5 cottas (1 c., 10 ch., 13 g., 1 k., 1 kr.) for Rs. 333-5-5—namely, at Rs. 200 per cotta. It is said to be remarkable that in a deed of release dated seven years afterwards (11th July, 1922), by which Haripada Jathi (Nutbehari's sircar) disclaimed having any interest in certain lands in Howrah acquired by his master in his name, there is added at the end a reference to a plot of mokarari homestead land at Fatehpur measuring in the entire 16 annas, 1 cotta, 14 chittahs more or less. It would indeed be remarkable. If the properties be the same it would suggest

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that the entry in the deed of release was a fictitious entry to enable registration to be effected at the Registry at Behala. This it may well have been in any case. But the measurements and the boundaries are given in both documents and neither correspond: nor are they identifiable in any other way, so the argument comes to nothing.

On 24th November, 1922, Haridas joined in a deed conveying to Panchanon Roy a half share in a Calcutta house which share Nutbehari had bought at an execution sale in 1917. The tenor of the deed shows that the explanation given and supported by the evidence of a pleader's clerk is in all probability correct. If Haridas and Nutbehari had been joint in estate generally or even as regards this transaction the deed would have been worded very differently and there would have been no point in describing Haridas as living in joint mess with Nutbehari—a limited phrase of distinct negative significance. That Haridas should join for safety's sake at the purchaser's instance is a very ordinary matter.

On 27th July, 1920, Nandarani, widow of Rajendra Manghi, transferred certain land for a price of Rs. 550 to Manmatha, who for the same price sold it on 28th April, 1921, to Naba Karmakar. Rajendra had mortgaged it in 1914 to Tinkari Dandapat, who was paid off on 11th January, 1920, by Upendra Nath Das (Rs. 195 due for principal and interest). Upendra was paid off by Nutbehari on 5th July, 1920 (Rs. 222-4-0=Rs. 195 and interest thereon). Upon the completion of the purchase by Manmatha this sum was deducted from the purchase price and what was paid according to the statement on the deed of sale was the balance only. Manmatha's evidence now is that he knew nothing of the transaction, it being done entirely by his uncle. Nutbehari says he got his money back with interest, which seems to be incorrect, also that he got it from Nandarani out of what Manmatha paid to her. The deed is not so expressed. Upendra says he paid off Tinkari because he intended to buy the land for Rs. 400 but that Nutbehari paid him off and he understood that Nutbehari was offering a higher price. Rajendra, the pleader's clerk, says the consideration money was paid by Manmatha, but he seems to be hazy on the subject. To make anything of this particular case the respondents must succeed in proving that Nutbehari never directly or indirectly got his money back. As

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no one believes Manmatha's evidence on the matter in this suit and as he solemnly recited at the time in his conveyance to Naba Karmakar that he had been enjoying the property ever since Nandarani's conveyance "without any share being owned by anyone else in respect thereof," the respondents can hardly ask the Board to come to any firm conclusion in their favour, still less to treat this matter as decisive of the case as a whole.

Attention has been drawn to one or two other transactions but these contain nothing that can be regarded as decisive or even important.

The High Court's decree proceeds on the footing that even before Manmatha's contract business was begun in 1913 Nutbehari was bringing his separate self-acquisitions into the joint family estate. It includes all the movables in Schedule *Kha* to the plaint, though this matter is not discussed sufficiently for their Lordships to be certain that they understand the view taken on this point by the learned Judges. Since the suit was brought the modi shop has apparently been conducted in the name of the respondents and by one or other of them. The appellant is not much concerned with it and an order to partition it will do as much harm as good to the respondents. It does not follow that they are entitled to such an order merely because their uncle started the shop to provide for them a profitable employment.

In the result their Lordships are of opinion that this suit for partition cannot succeed save as to the homestead. The movables (Sch. *Kha*) and the other immovables are not shown to be joint family property. The directions given by the trial Judge as to the manner in which the homestead should be dealt with by way of partition have been set aside by the High Court. As they do not seem to have been supported by learned counsel on behalf of Nutbehari they will not be restored. The proper method of partitioning the homestead will be left open for determination by the commissioner or other authority entrusted with the carrying out of the partition decree, it being understood that while the buildings are not to be taken as themselves joint family property, the method proposed by the Subordinate Judge is not to be adopted, unless indeed the parties agree thereto hereafter. The observations

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quoted by Mitter, J., from Ram Charan Mitter's Tagore Lectures on Partition emphasise an important principle, but as there is not even a plan of the homestead and buildings before the Board, it would not be safe or right to direct that the buildings should be divided into the same shares as the land. Perhaps the most ordinary method when one co-sharer has put up buildings on the land is to allot to him for his share a portion of the land which contains his building. When this cannot be done or would not be fair it may nevertheless be unreasonable and unnecessary to treat such co-sharer exactly as the others. The scheme of partition should not be taken out of the hands of the commissioner of partition in advance but should be left in the first instance to his discretion in the usual course.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court be set aside and the decree of the Subordinate Judge restored save for the direction therein contained as to the manner of partition and for the reference to the modi shop which should be deleted. The respondents must pay to the appellant his costs of this appeal and two-thirds of his costs in the High Court.

Solicitors for Appellant: *Barrow, Rogers and Nevill.*

Solicitors for Respondents: *W. W. Box & Co.*

R. C. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—SIR M. VENKATASUBBA RAO, *Kt., Officiating Chief Justice* AND MR. JUSTICE HORWILL.

Aga Mirza Nasarali Khoyee & Co., by its sole Proprietor, Aga Mirza Nasarali Khoyee .. *Appellant** (*Plaintiff*)

v.

Gordon Woodroffe and Company (Madras), Ltd. .. *Respondents* (*Defendants*).

Aga Mirza Nasarali Khoyee & Co. *v.* Gordon Woodroffe & Co., Ltd.

Sale of Goods Act (III of 1930), Ss. 16 (2) and (4), 17 and 59—Sale of skins by description—Covenant that goods should be of fair average quality and passed by buyers—Goods passed by buyers—Defects noticed when goods were put into work—Latent defect—Right of buyers to claim damages—Meaning of expression "merchantable quality".

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* O. S. A. No. 1 of 1936. 6th August, 1936.

Aga Mirza Nasarali Khoyee & Co. *v.* Gordon Woodroffe & Co., Ltd.

The plaintiff sued for the price of certain skins sold by him to the defendants, and the defendants counterclaimed for damages on the ground that the goods supplied did not fulfil the description in the contract which was as follows: "To be fair average quality of description and to be passed by G. W. Co., Madras, as such". It was shown that the goods sold had been inspected before delivery and thereupon approved and accepted in performance of the agreement. The defective condition of the skins became known only when they were put into work subsequently. The question was raised whether if the goods were passed by G. W. Co., there was an end of the matter, or if there was a further condition, namely, that the goods should in addition be of the quality mentioned.

Held, that the sale being one by description governed by S. 16 of the Sale of Goods Act there was an implied condition as to the quality of the goods, and the superadding of the provision as to inspection did not reduce the importance of the independent undertaking as to the quality. The buyers were consequently entitled to claim damages from the seller for the latent defect in the quality of the goods sold.

Held, further, that there being an express covenant as to quality it was not necessary to invoke S. 16 (2) of the Sale of Goods Act, and that the buyers were entitled to sue the seller for damages for breach of the condition as to quality.

Meaning of the expression "merchantable quality" in S. 16 (2) of the Act discussed.

Bird v. *Smith*, (1848) 12 Q.B. 786: 116 E.R. 1065; *Bigge* v. *Parkinson*, (1862) 7 H. & N. 955: 158 E.R. 758; *Drummond* v. *Van Ingen*, (1887) 12 A.C. 284 and *Grant* v. *Australian Knitting Mills*, (1936) A. C. 85, considered.

On appeal from the judgment and decree of the Honourable Mr. Justice Mockett, dated the 30th day of October and 15th day of November, 1935, and passed in exercise of the ordinary Original Civil Jurisdiction of the High Court in C.S. No. 325 of 1932.

V. Radhakrishnayya and *S. Ramaswami Aiyangar* for Appellant.

S. Doraiswami Aiyar instructed by *King* and *Partridge* for Respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, Offg. C.J.

The Officiating Chief Justice.—On the important questions of law relating to the sale of goods which this appeal raises, able arguments have been addressed to us by the Counsel on both sides. The suit has been brought for the price of certain skins sold and the defendants have counterclaimed for damages on the ground that the goods supplied do not fulfil the description in the contract. The plaintiff against whom damages have been awarded by the learned Trial Judge, has filed this appeal.

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The contract is obviously not for sale of specific goods and this has been conceded by Mr. Radhakrishnayya for the appellant. We must therefore proceed upon the footing that the sale was by description and that the contract is governed by S. 16 of the Indian Sale of Goods Act. The first question that arises is, what is the effect of the stipulation in the contract that runs:

" To be fair average quality of description and to be passed by Messrs. Gordon Woodroffe & Co., Ltd., Madras, as such".

In other words, does it, upon a true construction, mean that if the goods are passed by Messrs. Gordon Woodroffe & Co., there is an end to the matter or, does the clause impose a further condition, namely, that the goods should in addition be of the quality mentioned? The case which both sides have strongly relied upon, is *Bird* v. *Smith*[1]. The contract there was for sale of iron rails

"to be inspected and certified as then agreed upon between the parties and to be equal in quality to any rails made in Staffordshire".

It was urged there, as here, that the goods had been inspected before delivery and thereupon approved and accepted in performance of the agreement. It was held that this was a bad plea, as being no complete answer to the declaration. Lord Denman, C. J., who delivered the judgment of the Court, declares that there were two stipulations, each being in its terms distinct, in other words, that in addition to the provision for inspection and approval, there was an absolute warranty for quality to guard against defects which inspection could not discover. The position in the present contract is very similar, indeed, the only difference is, that the order of the terms is reversed. Here the first term related to the quality, the second to the inspection; whereas in the case cited, after the stipulation for inspection and approval, came the undertaking as to the quality. The question is ultimately one of construction and as observed in *Bigge* v. *Parkinson*[2] if it could be gathered from the contract that the articles were to be supplied to the satisfaction of the buyers or their agents, so that they were to be the sole judges whether the articles answered the description or not, such an undertaking would be inconsistent with the absolute condition implied by the law. On the facts of that case, the contention by the defendant that the express condition in the contract

1. (1848) 12 Q.B. 786: 116 E.R. 1065.
2. (1862) 7 H. & N. 955: 158 E.R. 758.

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excluded any implied condition, was overruled. *M'Clelland* v. *Stewart*[1] strongly relied upon by Mr. Radhakrishnayya, is distinguishable and does not contravene the principle enunciated in *Bigge* v. *Parkinson*[2]. Turning to the clause in question, to construe it reasonably, we must give effect to what must be regarded the decisive word, 'and', occurring in it; the superadding of the provision as to inspection does not reduce the importance of the independent undertaking as to the quality.

In support of the contention that the goods having been passed by the buyers, they could no longer rely upon any defect later discovered in regard to the quality, another argument is put forward, namely, that the clause should not be so construed as to cast too heavy a burden on the vendor. The argument is put thus: the contract of sale being conditional on the goods being approved by the buyers, they are constituted, as it were, judges in their own cause: that is onerous enough; why should the Court further so construe the contract as to superadd to this term, the absolute condition as to quality? But as observed by Cockburn, C.J., in *Stadhard* v. *Lee*[3]:

> " The duty of the Court in such cases is to ascertain and give effect to the intention of the parties as evidenced by the agreement; and though, where the language of the contract will admit of it, it should be presumed that the parties meant only what was reasonable, yet, if the terms are clear and unambiguous, the Court is bound to give effect to them without stopping to consider how far they may be reasonable or not". (Benjamin on Sale, 7th dition, p. 605.)

Mr. Radhakrishnayya next contends that this contract should be considered with reference to the surrounding circumstances. But in the case of a document which is plain and unambiguous, the intention of the parties should be gathered from the language of the document itself.

Then comes the question as to the quality of the goods supplied, which must be considered in two aspects. First, if S. 16 (2) applies and there is an implied condition that the goods shall be of merchantable quality, was that condition complied with?; secondly, if the express provision in the contract "to be fair average quality" should prevail, did the goods answer that description? On the evidence on the record, our finding on this point must be against the plaintiff, the

1. (1883) 12 L.R. Ir. 125.
2. (1862) 7 H. & N. 955: 158 E.R. 758.
3. (1863) 3 B. & S. 364: 122 E.R. 138.

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vendor. There has been some dispute as to the meaning of the word "merchantable" occurring in the Sale of Goods Act. It is not sufficient that the goods are marketable or saleable (that is, no doubt the dictionary meaning of the word) for, in the statutory sense the significance of the word "merchantable" is relative, the test being, are the goods merchantable or not under the particular description in the contract? The same idea may be expressed differently by stating that the term, that the goods shall be of merchantable quality is fulfilled when they do not differ from the normal quality of the described goods, including under the term "quality" the state or condition as required by the contract. (See *Drummond* v. *Van Ingen*[1], *Grant* v. *Australian Knitting Mills*[2], *Bristol Tramways, etc., Co., Ltd.* v. *Fiat Motors, Ltd.*[3], *Jackson* v. *Rotax Motor & Cycle Co.*[4] and *Sumner Permain & Co.* v. *Webb & Co.*[5])

The appellant's Counsel then contends that the defects, such as they were, were patent or discoverable defects and that the proviso to S. 16 (2) which, he urges, governs the contract, protects the seller. He relies upon certain passages in Mr. Cook's deposition and at first sight they seem to support him. But if his evidence is read as a whole and critically examined, it shows beyond doubt, that the true condition of the skins could not have been ascertained at Madras by such examination as dry salted skins are generally subjected to. There is one circumstance which places the matter beyond doubt. When the skins were first inspected at Northampton, Mr. Cook not only approved the goods but complimented Mr. Taylor on their excellent quality. (This incidentally disproves the theory that the skins became deteriorated after they had been taken delivery of at Madras and before they reached England.) What then emerges from the evidence of the various witnesses, through which we have been carefully taken? No reasonable examination of the skins in their dry salted state could have revealed the defect; only when the skins were "put into work" that is "put into water", was their true condition discovered. On the question as to what

1. (1887) 12 A.C. 284 at pp. 287, 289 and 291.
2. (1936) A.C. 85 at p. 100.
3. (1910) 2 K.B. 831 at pp. 840 and 841.
4. (1910) 2 K.B. 937. at p. 945.
5. (1922) 1 K.B. 55.

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are discoverable as distinguished from latent defects, the decision of the House of Lords in *Drummond* v. *Van Ingen*[1] already cited, contains a valuable pronouncement. As Lord Herschell observes, the implied warranty will be excluded as regards any defects which a buyer of ordinary diligence and experience would have detected by "due diligence in the use of all ordinary and usual means"—what is due diligence, depending upon the circumstances (p. 294). If merchants possessed of ordinary skill, using due care and diligence, would not have thought of the existence of the particular defect which gives rise to the action, such a defect would be a latent or hidden one as distinguished from a patent defect (*see* Lord Macnaghten, p. 297). Cl. 2 of S. 16 and the proviso thereto runs thus:

"Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed".

The language of this proviso may be usefully compared with S. 17 which deals with sale by sample. That enacts:

"In the case of a contract for sale by sample there is an implied condition that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample". [S. 17 (2) (*c*).]

Though these two clauses are worded differently, there can be little doubt that they are intended to convey the same meaning; in other words, the defects contemplated in S. 16 are those "apparent on reasonable examination" within the meaning of S. 17. In this connection, we must observe that Lord Herschell, while dealing with the implied condition as to any defects, makes no distinction between inspection of bulk or of sample, although in the case under discussion the sale was by sample (*see* p. 294). Then again, in *Grant* v. *Australian Knitting Mills*[2] to which we have already referred, the sale was not by sample, but yet Lord Wright, delivering the judgment of the Judicial Committee, in dealing with the question of patent defects uses language, which more or less occurs in the section, relating to sale by sample (*see* p. 100). On the question as to what are discoverable defects, these

1. (1887) 12 A.C. 284.
2. (1936) A.C. 85.

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two decisions, one of the House of Lords and the other of the Judicial Committee, are of binding authority and it is unnecessary to enquire whether a different principle has been laid down in the cases relied on by Mr. Radhakrishnayya, namely, (1) *Thornett & Fehr* v. *Beers & Son*[1] and (2) *Pinnock Bros.* v. *Lewis & Peat, Ltd.*[2]

This brings us to the question, what is the effect of S. 16 (2) read along with the proviso? As Mr. Doraiswami Aiyar contends, the combined effect of the clause and the proviso is, that the implied condition extends to merchantability less patent defects. From our finding that the defects in the present case were not patent or discoverable, the conclusion follows that the seller, who under the section is answerable from latent defects, remains liable. Granting then that S. 16 (2) applies, we must hold that the defendants are bound to succeed.

Mr. Doraiswami Aiyar urges in the alternative (thereby taking a higher stand), relying on the clause extracted above, that here is an express condition as to quality and that being so, it is unnecessary to invoke S. 16 (2). In our opinion, this contenion also is well founded. S. 16 (4) reads thus:

"An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith".

Now, what is the express condition here?—that the goods shall be of "fair average quality". That clearly is inconsistent with the condition arising by implication, namely, that although the goods are warranted merchantable, discoverable defects are excluded. The position therefore comes to this, that the express condition gives the purchaser a higher right than he would possess under a contract where the term would be merely implied in law. The next step in the argument is, that the buyer might treat the condition as a warranty, a breach of which would give rise to a claim for damages, although he would be precluded from rejecting the goods. That is, Mr. Doraiswami Aiyar urges, what has precisely happened here. The provisions of law relevant to this argument are Ss. 12, 13, 42 and 59 of the Indian Sale of Goods Act. The quality warranted being part of the description of the goods, the term in question becomes a condition under S. 12. Next, it follows from S. 13 that when the buyer has

1. (1919) 1 K.B. 486.
2. (1923) 1 K.B. 690.

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accepted the goods, he can treat the breach of a condition only as a breach of warranty. In the present case the defendants accepted the goods within the meaning of S. 42, for, after the skins had been delivered to them, they "put them into work" an act inconsistent with the ownership of the seller. Now comes S. 59 the last of the four sections to which we have referred. Where the buyer elects or is compelled as here, to treat any breach of a condition as a breach of warranty though he is not entitled to reject the goods, he has a right to sue the seller for damages. It is this right which by the counter-claim the defendants are seeking to enforce. They are entitled to do so and on this ground also our judgment must be for the defendants.

As to the measure of damages, out of 18,000 skins supplied, 3,920 were found tainted. 1,483 of these were perfectly worthless and no question arises. As to the balance, the only question is, were the defendants in the circumstances bound to sell them by auction for estimating the loss? When the skins were "put into work", the salt would no longer be there to arrest the putrefaction. How could one reasonably expect that such skins would find a market? In the circumstances, though the evidence on the point is somewhat obscure and unsatisfactory, we are not prepared to differ from the learned Trial Judge.

As to the costs of the auction, the question is not what we consider right, but whether there are grounds to justify our interfering with the learned Judge's discretion. There is something to be said, as the appellant's Counsel urges, against the conduct of Messrs. Gordon Woodroffe & Co. It was their servant who, by agreement, was employed by the plaintiff to cure the skins. Again, the case is one of a string of contracts and much of the trouble has arisen by reason of their having wrongly represented to their buyers that the skins were of their "own cure". In spite of these facts, we do not feel that we ought to disturb the Trial Judge's order.

In the result, the appeal fails and is dismissed with costs.

The Memorandum of Objections is not pressed and is likewise dismissed with costs.

B. V. V. —— *Appeal and Memo. of objections dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD MAUGHAM, SIR SHADI LAL AND SIR GEORGE RANKIN.

The Jupiter General Insurance Company, Limited .. *Appellants**

v.

Ardeshir Bomanji Shroff .. *Respondent.*

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Master and servant—Wrongful dismissal—Claim for damages—Life Insurance Company—Servant suppressing relevant information—Interests of Company jeopardised—Failure of servant to apologise when asked to explain—Summary dismissal of servant whether proper—Suit for damages for wrongful dismissal—Maintainability.

The defendants were an Insurance Company and the plaintiff was the manager of the Life Insurance Department of the Company. The Company at first received from another Insurance Company a proposal for re-insurance on the life of one *K*. The Managing Governor of the defendant Company took the view that the proposed re-insurance was not in the interests of his Company and wrote the word "declined" on the letter containing the proposal for re-insurance. The letter and the papers were sent to the plaintiff. Subsequently the plaintiff interviewed the Managing Governor about the same proposal for re-insurance and he was then personally informed that the proposal was not in the interests of the Company, and ultimately a letter was written to the other Company declining the proposal for re-insurance. A week thereafter there was laid before the Secretary of the defendant Company a proposal for the direct life assurance of *K* for a large amount, and the plaintiff had therein recommended the issue of a ten years' endowment policy. There was no reference in the papers to the prior refusal of the Company or to the personal doubts previously expressed by the Managing Governor. Two days later the plaintiff again pointed out to the Secretary that a certain friend of *K* had also recommended the proposal for assurance. During one of his interviews with the Managing Governor the Secretary casually mentioned about the proposal for the direct assurance of *K*. The Managing Governor immediately noted his refusal on the papers and having sent for the plaintiff asked him why he had not made any reference to the previous re-insurance proposal having been refused. Thereupon the plaintiff became angry and told the Managing Governor that he had no business to ask him questions and added that the Governor did not know how to behave himself. He then said "I do not care for this job, and I can find such jobs elsewhere". The plaintiff was soon after dismissed summarily by the defendant Company and he thereupon sued the Company for recovery of damages for wrongful dismissal.

Held, that the plaintiff was guilty of serious misconduct which justified his summary dismissal and that his claim for damages was not sustainable.

While on the one hand it can only be in exceptional circumstances that an employer will be acting properly in summarily dismissing an employee on his committing a single act of negligence, on the other it cannot be said that a single outbreak of bad temper, accompanied it may be with regrettable

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language, is a sufficient ground for dismissal. The test to be applied in such cases must vary with the nature of the business and the position held by the employee. If a person in charge of a life insurance department subject to the supervision of superior officers, shows by his conduct or by his negligence that he can no longer command their confidence and if when an explanation is called for he refuses apology or amendment, his immediate dismissal is justifiable.

Appeal from a decree of the High Court of Judicature at Bombay in its Appellate Jurisdiction dated 19th March 1935, allowing in part in appeal from the decree of the Trial Judge.

R. P. Broom-Johnson and *C. P. Harvey* for Appellants.

A. M. Dunne, T. J. Strangman and *S. P. Khambatta* for Respondent.

15th April, 1937. Their Lordships' judgment was delivered by

Lord Maugham.

LORD MAUGHAM.—This is an appeal from a judgment and decree of the High Court of Judicature at Bombay in its Appellate Jurisdiction, dated 19th March, 1935. The judgment allowed in part the respondent's appeal from the decree of Mr. Justice Davar, dated 23rd August, 1934, and awarded him the sum of Rs. 17,000 as damages for wrongful dismissal from the service of the appellant company.

Various questions were argued in the Courts below; but the only question with which their Lordships find it necessary to deal is whether, assuming that upon the true construction of the contract of service between the parties, the respondent's employment was not terminable on one month's notice, the appellants were entitled summarily to dismiss the respondent from their service. In the view their Lordships take of the appeal it is unnecessary to express an opinion upon the true construction of the contract of service, or on the question as to the proper measure of damages if any were recoverable.

The appellants carry on a large insurance business in Bombay. A firm called Lalji Naranji and Co. are the managing agents and Mr. Lalji Naranji is or was the chairman of the board of directors of the appellants. A Mr. Mody was the managing governor and was authorised to do all the business of the company subject to the control of the managing agents. The respondent was at first in the service of the appellants from the 1st June, 1925, until the 1st June, 1926, as a canvasser. In May, 1928, the appellants opened a Life Insurance Department, and in that month the respondent

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re-entered their service as manager of that department. His salary began at Rs. 200 a month. On the 24th January, 1930, after some other increases, it was raised to Rs. 400 a month as from 1st January, and by a letter of 24th January, it was agreed that in the event of the Life Department showing certain annual increases in the business, his salary would be gradually increased up to a maximum of Rs. 700 a month. The letter concluded by saying: "In the event of your not being able to fulfil the guarantee mentioned above we have the right to terminate your engagement at any time thereafter by one month's prior notice of our intention to do so". The letter contained no other statement as to the notice to which the respondent was to be entitled if he was dismissed. It was contended on behalf of the respondent that, upon the true construction of the letter, he was entitled to continue in his employment for at least 3½ years (afterwards extended to 4½ years) subject only to the right to terminate under the concluding paragraph of the letter, in the event of the so-called guarantee as to increase of business not being fulfilled. Their Lordships do not think it necessary to express any opinion on this part of the case.

The respondent was in fact dismissed from his employment on the 21st December, 1931, by a letter stating that his services were no longer required, and that the cashier had been instructed to pay him his salary for the current month, and also one month's salary in lieu of notice. The letter was signed by Mr. Mody as managing governor of the company; and both he and the secretary of the company deposed to the fact that the letter was written in that form out of consideration for the respondent, and in order that he should not find it difficult to obtain service elsewhere. Their Lordships were not persuaded that one month's notice was sufficient unless the clause at the end of the letter of the 24th January, 1930, could be relied on, a question which depends on facts on which there have been findings in favour of the respondent. Their Lordships, therefore, must approach the matter as if the case was one of summary dismissal without notice, though clearly the position of the appellants is not worse than it would have been if no salary in lieu of notice had been paid.

The respondent at the trial and before their Lordships has placed much reliance on a circular bearing date the 31st October, 1929, and circulated among the superior

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officials of the company. It was prepared by Mr. Mody, who was therein described as the "managing governor," for the guidance of the office establishment, and it stated that it had been found that no responsibility was fixed on any of the officers for any work and it had, therefore, been decided to divide the work in the manner mentioned. To the managing governor was allocated the business of fire, marine and accident (foreign and up-country). To the secretary was allocated the business of fire, marine and accident (local business). There followed the words "the Life Department, both local and up-country, will be looked after by the secretary entirely." The circular stated that the company had two officers, namely, the managing governor and the secretary, and that the work of both these officers was supervised by the managing agents, and there were a number of other references to the duties of the managing governor. The respondent was not mentioned in the circular, nor was his position therein defined. The respondent has contended that the managing governor had no concern with the Life Insurance Department, and that he was entitled to resent any action by the managing governor in supervising that department as being officious and intermeddling. The Trial Judge, however, refused to accept this view. The respondent was driven to admit in the course of cross-examination that the secretary, a Mr. Iyer, had to be in constant consultation with Mr. Mody about the details of the proposals for life insurance. Further a number of documents were produced in Court which showed Mr. Mody's habitual supervision of the life insurance business. Not only were the respondent's statements with reference to this matter thus proved to be ill-founded, but according to the learned Judge, he was driven to invent falsehoods in order to get over the effect of the documents. Moreover, in addition to the evidence given by Mr. Mody and Mr. Iyer, which, according to the learned Judge, stood unchallenged, there was evidence given by a Mr. Shangji Narsingh Nagarmutt, the managing agent of several Indian insurance companies, who had been in constant touch with Mr. Mody, and that evidence satisfied the learned Judge beyond a doubt that the respondent's story that Mr. Mody was a figure-head in the office, so far as the Life Department was concerned, was a tissue of falsehood. Their Lordships have thought it right to mention these facts because so much reliance has been placed on the

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circular and its effect both by the respondent and by the learned Judges in the Appellate Court; but, for reasons which will appear later, they attribute only a minor importance to this matter.

The events which led up to the dismissal of the respondent can safely be taken from the evidence given by the appellants' witnesses. The Trial Judge accepted their evidence, and he stated in unequivocal terms that not only had Mr. Mody and Mr. Iyer satisfied him that they were upright and straightforward gentlemen, but they had given their evidence fairly and well; and he further said that he disbelieved the respondent in every particular where his evidence was in conflict with theirs. It should be added that the judgment of the Appellate Court dealt with the appeal on the basis that the Trial Judge's view of the facts had to be accepted. Their Lordships were not invited to take another view; but they think it right to add that in their opinion the learned Judge was fully justified in his remarks as to the relative credibility of the witnesses.

The material circumstances are as follows. On the 10th December, 1931, the appellants received by letter from the Bombay Mutual Life Assurance Society, Limited, an advice that they had received a proposal for life insurance from one Keshavji Manekchand, and the appellants were requested to re-insure the risk up to Rs. 10,000. This letter was immediately placed before Mr. Iyer, the secretary of the appellants' company, and was passed on by him in the ordinary course to Mr. Mody, who occupied the same room in the office as Mr. Iyer. It so happened that Mr. Mody was well acquainted with the life proposed to be insured, he having been a neighbour of his for ten years. Taking the view that Keshavji's life was not a good one, and that the re-insurance was not in the interest of the appellant company, he wrote the word "declined" on the letter of the 9th December, and initialled it. The letter and papers went back to the respondent as the branch manager of the Life Department.

On the 11th or 12th December the respondent (in accordance with the usual practice) had an interview with Mr. Mody with reference to other life business, and he asked Mr. Mody what objection there was to the acceptance of the proposal of re-insurance on the life of Keshavji. Mr. Mody told him that

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Keshavji was his next door neighbour and a friend, and that he knew more about him than anyone in the office did, and he did not want to entertain the proposal. The respondent started grumbling by saying that, if they refused proposals of that kind, they could not be expected to do a large business, to which Mr. Mody replied that he did not want his company to get into trouble by accepting such risks, and that he would not change his decision. Accordingly, on the 15th December, a letter was written to the Bombay Mutual Life Assurance Society declining the re-insurance proposition. It was prepared under the directions of the respondent, who initialled it, and it was signed on behalf of the appellants by Mr. Iyer.

On the 19th December there was laid before Mr. Iyer a proposal for the direct life assurance of the same Keshavji for the sum of Rs. 50,000. The accompanying papers included a note initialled by the respondent recommending the issue of a 10 years' endowment policy. Mr. Iyer, who habitually signed the appellants' letters on many subjects, dealing sometimes with as many as 300 in a day, had no recollection of having signed the letter of the 15th December, refusing the proposal of re-insurance, and the note initialled by the respondent recommending the acceptance of the risk did not contain any reference to this refusal nor to Mr. Mody's personal doubts as to the life proposed to be insured. On the 21st December, the respondent again brought the papers to Mr. Iyer, and pointed out that Mr. Lalji Naranji, who was said to have been a friend of Keshavji, had written the word "accept" on the office note. The papers were left on Mr. Iyer's table, and the latter mentioned casually to Mr. Mody, who was in the office, that the appellants had accepted a direct insurance proposal for Rs. 50,000 on the life of Keshavji. Mr. Mody, who was surprised to find that Mr. Iyer had not been informed of the refusal by himself of the re-insurance proposal, wrote the words "I am against this acceptance" on a slip which he attached to the papers and he sent them back to the respondent's department.

Mr. Mody then sent for the respondent, Mr. Iyer remaining in the room. Mr. Mody reminded the respondent of the previous re-insurance proposal and asked him why he had not made any reference to this fact in the note submitted to Mr. Iyer on the 19th December. Thereupon the respondent

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became very angry and told Mr. Mody that he had no business to ask him any questions, and added that Mr. Mody did not know how to behave himself. He then said: "I do not care for this job, and I can find such jobs anywhere." Mr. Iyer, who had kept silent, made a gesture suggesting that the respondent should be sent out of the room. Mr. Mody asked the respondent to leave but he declined. Mr. Mody then said, "All right, stand," and on that the respondent left the room.

Mr. Mody and Mr. Iyer held a short consultation which resulted in the letter of dismissal being sent to the respondent.

In considering the importance of the incident, it should be added that the proposed risk was of an exceptional character, both as to amount and as to the age of the proposer. The practice of the office was not to insure persons above the age of 50, and Keshavji was 52 at this time. Further, the practice was not to remain liable on any life in respect of a sum exceeding Rs. 10,000, and it would, therefore, be necessary to re-insure for no less than Rs. 40,000. Having regard, however, to the fact that Keshavji was insuring his life for a large sum with the Bombay Mutual Life Assurance Society and that that society had been unsuccessfully seeking to re-insure with the company, it was obvious that a re-insurance to the amount of Rs. 40,000 in respect of such a life might be very difficult to obtain on satisfactory terms.

The solicitors for the respondent made a claim against the appellants, and wrote some letters which will be referred to later. On the 29th March, 1932, the respondent commenced the present action, in which he claimed not only a considerable sum for damages for wrongful dismissal, but also certain sums for travelling expenses and overriding commission, to which he claimed to be entitled. The latter claims failed and as already stated, the only matter with which their Lordships think it necessary to deal is that of alleged wrongful dismissal.

The trial of the action before Mr. Justice Davar occupied 15 days. A great part of this time was devoted to the unfounded claim for overriding commission. The respondent himself was in the witness box for six days, but called no other witness. In coming to the conclusion that the claim for commission was unfounded the learned Trial Judge, as already stated, found that the respondent in his evidence had invented false incidents, imagined interviews which

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never took place, placed falsehoods into the mouths of people whom he did not venture to call as witnesses, and had put forward a fraudulent document. With regard to the proposals for re-insurance and for direct insurance on the life of Keshavji Manekchand, the respondent gave evidence that the proposal for direct insurance was received before the proposal for re-insurance, and that the reason why the latter proposal was refused was that Mr. Iyer and the respondent, having discussed the matter together, agreed that there was no object in accepting a re-insurance proposal when the appellant company had already got a direct proposal for a larger amount. The learned Judge however wholly disbelieved this story and found that the facts were as set out above. The respondent went so far as to suggest in his evidence that the word "Decline" and the initials of Mr. Mody on the re-insurance proposal dated the 9th December, 1931, from the Bombay Mutual Society were not in fact written on the document at any time before the respondent's dismissal but were added by Mr. Mody at some subsequent date for the purpose of supporting the appellants' defence to the action. These suggestions also were wholly rejected by the learned Trial Judge.

As regards the interview of the 21st December, 1931, which resulted in the respondent's dismissal, it may be noted here as a remarkable fact that from first to last the respondent has given no intelligible explanation, apart from the false one above mentioned, of his conduct in recommending the risk (in the form of a ten years' endowment policy) without any reference to the fact that Mr. Mody had to his knowledge and for a good reason declined the re-insurance on the same life. It is not in dispute that at the interview of the 21st December, Mr. Mody, with the consent of Mr. Iyer, who was present throughout, began by asking for an explanation of the respondent's conduct. It cannot be doubted that his conduct called for explanation. He in fact gave none. His own account of the interview at the trial, even if it could be believed, is wholly unsatisfactory. According to him when he came into the room Mr. Mody was very angry and banged his fist on the table and asked in a loud tone why he had recommended Keshavji Manekchand's proposal to the directors and that he himself said that since the proposal had been received in the office it ought to be put before the directors, that Mr. Mody thereupon

said in a very loud tone, "I do not want this business to be accepted," to which the respondent replied that it was his duty to put forward the papers and that he was not taking any instructions from Mr. Mody. The evidence of Mr. Mody and Mr. Iyer, which the Judge accepted, was as set out above. The main point of difference between their version and the respondent's was that they denied that Mr. Mody had spoken angrily and they spoke of the rudeness and violent manner displayed by the respondent.

Even if their Lordships could accept the view that the respondent was entitled to conduct the life insurance business without question or interference from Mr. Mody, as to which they have above expressed their opinion, the respondent's behaviour according to his own statement was intolerable. It is important to remember that on the one hand Mr. Mody had only a week before told the respondent that Keshavji was his next door neighbour and that he did not approve of the risk. It could not be in any way proper to approve the risk and to forward it to the directors—which really meant to Mr. Lalji Naranji—without a statement of these facts. Even if Mr. Mody had no authority in the matter his view, founded on special knowledge, ought not to have been in effect suppressed. In the second place Mr. Iyer, who was admittedly the official in charge of the Life Department and the respondent's superior, was present and if the latter really doubted the authority of Mr. Mody to require an explanation, what could be easier than to ask Mr. Iyer if he authorised the question and desired an answer? According to his own account the respondent refused to explain his conduct, and Mr. Mody and Mr. Iyer might very well come to the conclusion that it was not capable of any proper or satisfactory explanation.

As regards the explanation which Mr. Mody asked for it should be added that he was clearly in a position which required him to make inquiries as to every matter touching discipline and the rightful conduct of business. To take a strong illustration, suppose that there was ground for thinking that an official had been bribed in relation to the acceptance of a risk, could anyone doubt that it would be the duty of the managing governor to make inquiries and to submit the result of them to the managing agents? The notion that the circular (or any possible construction of it) furnishes an excuse for the res-

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pondent's refusal to explain or to defend his action and omission in relation to the risk to both Mr. Mody and Mr. Iyer seems to them to be without foundation.

Their Lordships do not take the view that the outrageous conduct of the respondent at the trial, including his inventions of interviews, his false charges and the tissues of falsehoods of which the Trial Judge has found him guilty, has any direct bearing, other than an evidential one, on the question whether he was properly dismissed; but they must observe that, in so far as anything turns on the correctness of the view formed by Mr. Mody and Mr. Iyer as to whether it was reasonably possible for the company any longer to employ the respondent, his behaviour in the witness box makes it exceedingly difficult to conclude that their view was a wrong one.

If there were any doubt as to the real meaning of the respondent's conduct at the interview it would be removed by the letter written by his attorneys (on the 13th January, 1932), after his dismissal. They state their client's view as follows:—"On the 21st ultimo Mr. Mody tried to interfere with our client's work and to dictate to him certain things which he had no right to do and which in our client's opinion was a most improper thing to do. Our client naturally did not agree with Mr. Mody's instructions....Our client rightly resented this interference from Mr. Mody and stated to him that he was not prepared to take any instructions from him in the matter." Their Lordships find it impossible to understand how the managing governor of the company could properly supervise the business if a subordinate officer chose not only to adopt this attitude, but in effect to overrule the decision of his superior in a case in which the latter had peculiar means of knowledge as to the danger of accepting a risk. Nor did the respondent improve matters by instructing his solicitors on the 1st February, 1932, to write a letter containing serious charges against Mr. Mody of giving "improper instructions" to the respondent—charges which there was no attempt whatever to justify at the trial.

Their Lordships recognise that the immediate dismissal of an employee is a strong measure and they have anxiously considered the evidence with a view to determine the question whether the learned Trial Judge was right in his finding that

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the respondent was guilty of gross negligence which, coupled with his conduct at the interview of the 21st December, was sufficient to justify his dismissal. On the one hand it can only be in exceptional circumstances that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence; on the other, their Lordships would be very loth to assent to the view that a single outbreak of bad temper, accompanied it may be with regrettable language is a sufficient ground for dismissal. The learned Chief Justice was stating a proposition of mere good sense when he observed that in such cases one must apply the standards of men and not of angels and remember that men are apt to show temper when reprimanded. Placing, however, all proper weight on these considerations their Lordships have yet to determine in view of the facts found by the Trial Judge, apart of course from the vital finding that the circumstances justified dismissal, whether the misconduct of the respondent was not such as to interfere with and to prejudice the safe and proper conduct of the business of the company and therefore to justify immediate dismissal.

It must be remembered that the test to be applied must vary with the nature of the business and the position held by the employee, and that decisions in other cases are of little value. We have here to deal with the business of life insurance. A mistake in accepting a risk may lead to a very considerable loss, and repetition of such mistakes may lead to disaster. The undertaking is one in which the undertaking of each individual risk is necessarily hazardous; and it is only by unremitting care and prudence that the business can profitably be carried on. If an officer of a life insurance company, whatever his motive may be, withholds from his superiors information which will in all probability lead them to refuse a risk, and *a fortiori* if it is one of exceptional character and magnitude, it would seem to be very difficult for his superiors to be confident that he will in the future properly carry out the important duties entrusted to him. In other words, if a person in charge of the life assurance department subject to the supervision of superior officers, shows by his conduct or his negligence that he can no longer command their confidence, and if when an explanation is called for he refuses apology or amendment, it seems to their Lordships that his immediate dismissal is justifiable.

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Some at least of the above considerations seem not to have been present to the minds of the learned Judges on the appeal to the High Court. In particular their Lordships cannot agree that the respondent was guilty of a mere error of judgment. They are satisfied from the evidence given at the trial that the respondent recommended the issue of the endowment policy, well knowing that the managing governor would have rejected it, and in the hope or the expectation that Mr. Iyer would not remember the facts as to the re-insurance proposal. They take a serious view as to the interview of the 21st December and they draw a different inference from that of the learned Judges as to the true meaning of the respondent's behaviour. Further and with all respect to the learned Judges in the Appeal Court they are of opinion that it is a mistake to consider the action of the respondent in approving the risk and his conduct at the interview as if these two matters could separately be excused or explained. They are in truth inseparable from the point of view of the action of Mr. Mody and Mr. Iyer in giving the notice of dismissal. On a review of the whole case their Lordships must come to the conclusion that the learned Trial Judge was justified in his view of the facts and in the conclusion at which he arrived.

For the reasons above stated their Lordships are of opinion that the appeal should be allowed, the decree of the Division Bench set aside, and the decree of the Trial Judge restored. The respondent will pay to the appellants their costs of the appeal to the Division Bench and of this appeal in addition to the costs awarded by the trial Court. They will humbly advise His Majesty accordingly.

Solicitors for Appellants: *E. F. Turner & Sons.*

Solicitors for Respondent: *T. L. Wilson & Co.*

R.C.C. *Appeal allowed.*

B.V.V.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD MAUGHAM, SIR SHADI LAL AND SIR GEORGE RANKIN.

Muhammad Husain Khan and others .. *Appellants**

v.

Babu Kishva Nandan Sahai, minor through Babu Deva Nandan Sahai .. *Respondent.*

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Hindu Law—Joint family property—" Ancestral " estate—Meaning—Property inherited from maternal grandfather—Son of person inheriting whether takes interest by birth—Civil Procedure Code (V of 1908), S. 99—Applicability to case before Privy Council—Suit by husband—Continuance by widow—Application for amendment of plaint so as to introduce personal right of widow—Amendment allowed and trial proceeded with—Objection to amendment raised before Board—Procedure.

The rule of Hindu Law is well settled that the property which a man inherits from any of his three immediate paternal ancestors, namely, his father, father's father and father's father's father, is ancestral property as regards his male issue and his son acquires jointly with him an interest in it by birth. Such property is held by him in coparcenary with his male issue and the doctrine of survivorship applies to it. But the son does not acquire by birth an interest jointly with his father in the estate which the latter inherits from his maternal grandfather.

The word "ancestor" in its ordinary meaning includes an ascendant in the maternal as well as the paternal line; but the ancestral estate in which under the Hindu Law a son acquires jointly with his father an interest by birth must be confined as shown by the original text of the Mitakshara to the property descending to the father from his male ancestor in the male line.

Raja Chelikani Venkayyamma Garu v. *Raja Chelikani Venkataramanayyamma,* (1902) 12 M.L.J. 299: L.R. 29 I.A. 156: I.L.R. 25 Mad. 678 (P C.), explained.

The provisions of the Civil Procedure Code do not regulate the procedure of the Privy Council in hearing appeals from India but the rule embodied in S. 99 of the Code is calculated to promote justice and accordingly the Board will not adopt a course which would merely have the effect of prolonging litigation where the alleged misjoinder of causes of action in the Courts below has neither affected the merits of the case nor the jurisdiction of the Court. Where the plaintiff died pending disposal of his suit and his widow having brought herself on record applied for an amendment of the plaint so as to include her personal right to the property and the Court permitted the amendment and allowed her to agitate her personal right as an alternative cause of action and the suit was tried on the amended plaint in respect of both the causes of action,

Held, that even if it was objectionable for the trial Court to have allowed the amendment of the plaint so as to introduce a new cause of

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* P. C. Appeal No. 97 of 1934. 7th May, 1937.
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action, the trial having proceeded on the basis of the amended plaint it was not necessary for the Board to interfere and render the trial abortive.

Decision of the Allahabad High Court affirmed.

Appeal from a decree of the High Court of Judicature at Allahabad, dated 23rd January, 1933 (Bennet and Rachhpal Singh, JJ.), reversing a decree of the Subordinate Judge of Banda dated 17th January, 1929.

A. M. Dunne, K. C., W. Wallach and *T. K. Kidwai* for Appellants.—The amendment of the plaint offends against O. 2, r. 5 of the Code of Civil Procedure, 1908, and is therefore not permissible. The amendment changes the nature of the suit, and the cause of action. As originally brought by Bindeshri, the suit was to set aside a sale on the ground of collusion and fraud, and it cannot be changed as is now sought to be done, by adding a contention that Bindeshri had only a life interest in the property and that his widow, who was brought on to the record on his death, was under the alleged will entitled absolutely to the estate. The widow cannot come into the suit and raise a separate case of her own. Refers to *Ma Shwe Mya* v. *Maung Mo Hnaung*[1]. The object of O. 2, r. 5 is to keep separate the class of cause of action which is peculiar to a representative of a deceased plaintiff who has been made a party to the suit in that capacity. The widow here is making a claim which has nothing to do with that of her husband. On the proper construction of the rule, she should have been relegated to her own suit. [*See* Mulla's Code of Civil Procedure, Fifth Edition (1926), at p. 202.] It would lead to grave mischief to allow such an alteration as is intended in the present case by treating it merely as a misjoinder under S. 99 of the Code. That section should not be treated as a provision which gets over an error expressly provided against by O. 2, r. 5.

[Lord Maugham drew attention to *Lord Tredegar* v. *Roberts*[2].]

The second point is that the property in this suit was the property of the joint Hindu family consisting of Ganesh Prasad and his son, Bindeshri, and that Ganesh was therefore not competent to dispose of it by will. It was held by the Board in *Raja Chelikani Venkayyamma Garu* v. *Raja Chelikani Venkataramanayyamma*[3] that a grandson inheriting property from his maternal grandfather takes it as ancestral property, and that, if he has brothers, it forms joint family property with the rule of survivorship at once attaching to it, the brothers accordingly not taking it as tenants in common or as if it were self-acquired property, but as joint property.

1. (1921) L.R. 48 I.A. 214 at 217: I.L.R. 48 Cal. 832 (P.C.).
2. (1914) 1 K.B. 283.
3. (1902) 12 M.L.J. 299: L.R. 29 I.A. 156: I.L.R. 25 Mad. 678 (P.C.).

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[*Lord Maugham*: In Mulla's Principles of Hindu Law it is stated at p. 235 that "*ancestral* property is unobstructed heritage".]

I submit that the Board have in *Raja Chelikani's case* (*supra*) said that obstructed heritage can be ancestral property. That different constructions have been placed on the Board's judgment in that case in India can be seen from *Karuppai Nachiar* v. *Sankaranarayanan Chetti and others*[1] and *Vythinatha Aiyar* v. *Yeggia Narayana Aiyar*[2] which are decisions in my favour, and *Jamna Prasad* v. *Ram Partab*[3], *Karri Ramayya* v. *Villoori Jagannadhan*[4] and *Bishwanath* v. *Ganjadhar*[5] all of which are against my proposition. I submit that, in view of the Board's decision in *Raja Chelikani's case* (*supra*) it is clear that there can be property descended from a maternal grandfather to daughters' sons which is not an unobstructed heritage but an obstructed heritage, which in the hands of the daughters' sons upon that descent is and becomes ancestral property, so that any son born to those sons afterwards is with his father a joint owner of the property. Reference was also made to Colebrooke's edition of the Mitakshara, Chap. 2, S. 2, para. 6, and Mayne on Hindu Law and Usage (1922), 9th Edition, p. 826, para. 563 (A).

L. De Gruyther, K.C., *S. Hyam* and *T. Prasad* for Respondent were called upon to argue only as to the question whether the property in dispute was ancestral property. There are two separate and distinct legal conceptions: (1) Two or more persons acquiring a joint estate as tenants in common, and (2) acquisition of an estate by birth. A joint estate by birth can be acquired only through paternal relatives, and not through females. (*See* Mayne on Hindu Law and Usage (1922), 9th Ed., Ss. 268, 270, 271, 274 and 276.) If nephews inherit by a brother, they take by inheritance, but it is not ancestral property. If a man dies leaving no widow and no sons, his daughters take his property by survivorship, and it is only when the last daughter dies that the daughters' sons come in at all, and then they take *per capita*. If there are several sons by different daughters, they cannot take as a joint family. *Raja Chelikani's case* (*supra*) is of a special character. There a grandfather died leaving as his heirs two grandsons by one of his daughters . Both the sons were, at the time when they took the grandfather's property, members of a joint and undivided Hindu family, and the question was not whether they had acquired an interest by birth, but whether they were joint tenants, that being the only point argued and decided. (Counsel referred to pp. 157, 159, 164 and 165 of the report.)

1. (1903) 13 M.L.J. 398: I.L.R. 27 Mad. 300 (F.B.).
2. (1903) I.L.R. 27 Mad. 382.
3. (1907) I.L.R. 29 All. 667.
4. (1915) I.L.R. 39 Mad. 930.
5. (1917) 3 Pat.L.J. 168.

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There was no question in that case of a right acquired by birth, the only question was whether the two brothers took by survivorship *inter se* or not. Reference was then made to the following cases *Atar Singh* v. *Thakar Singh*[1], *Bishwanath* v. *Ganjadhar*[2], *Jamna Prasad* v. *Ram Partap*[3], *Karuppai Nachiar* v. *Sankaranarayanan Chetti and others*[4] and *Vythinatha Aiyar* v. *Yeggia Narayana Aiyar*[5].

7th May, 1937. Their Lordships' judgment was delivered by

Sir Shadi Lal.

SIR SHADI LAL.—This is an appeal from a decree of the High Court of Judicature at Allahabad, dated the 23rd January, 1933, which reversed a decree of the Subordinate Judge of Banda, dated the 17th January, 1929, and allowed the plaintiff's claim for possession of a village called Kalinjar Tirhati with mesne profits thereof.

One Ganesh Prasad, a resident of Banda in the Province of Agra, was the proprietor of a large and valuable estate, including the village in dispute. He died on the 10th May, 1914, leaving him surviving a son, Bindeshri Prasad, who was thereupon recorded in the Revenue Records as the proprietor of the estate left by his father.

In execution of a decree for money obtained by a creditor against Bindeshri Prasad the village of Kalinjar Tirhati was sold by auction on the 20th November, 1924; and the sale was confirmed on the 25th January, 1925. Bindeshri Prasad then brought the suit which has led to the present appeal claiming possession of the property on the ground that the sale was vitiated by fraud. He died on the 25th December, 1926, and in March, 1927, his widow, Giri Bala, applied for the substitution of her name as the plaintiff in the suit. She was admittedly the sole heiress of her deceased husband, and this application was accordingly granted. She also asked for leave to amend the plaint on the ground that under a will made by his father-in-law, Ganesh Prasad, on the 5th April, 1914, her husband got the estate only for his life, and that on the latter's death his life interest came to an end, and the devise in her favour became operative, making her absolute owner of the estate including the village in question.

1. (1908) 18 M.L.J. 379: L.R. 35 I.A. 206 at 207, 211: I.L.R. 35 Cal. 1039 (P.C.).
2. (1917) 3 Pat.L.J. 168 at 171.
3. (1907) I.L.R. 29 All. 667 at 668.
4. (1903) 13 M.L.J. 398: I.L.R. 27 Mad. 300 (F.B.).
5. (1903) I.L.R. 27 Mad. 382.

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She accordingly prayed that, even if the sale be held to be binding upon her husband, it should be declared to be inoperative as against her rights of ownership.

The Trial Judge made an order allowing the amendment, and on the 28th May, 1927, recorded reasons to justify that order. In July, 1927, however, when the defendants in their additional pleas again objected to the amendment, the learned Judge framed an issue as to the validity of the amendment. He was, thereafter, transferred from the district, and his successor, who decided the suit, dismissed it on various grounds, and one of these grounds was that the amendment of the plaint changed the nature of the suit and should not have been allowed. The High Court, on appeal by the plaintiff, has dissented from that conclusion, and held that the amendment was necessary for the purpose of determining the real questions in controversy between the parties.

On behalf of the defendants, who are the appellants before their Lordships, it is contended that, while Giri Bala could continue the suit on the cause of action, which accrued to her husband, she was not entitled to add to it an alternative cause of action which accrued to her in her personal capacity. It is, however, clear that the suit has been tried on the amended plaint, and that the parties have adduced all the evidence relating to both the causes of action. Their Lordships do not think that, even if there is any substance in the objection raised to the amendment of the plaint, it should now be allowed to prevail, and all the time and labour expended on the trial of the suit should be thrown away. To prevent the mischief which may be caused by the reversal of the decree in a case of this kind, S. 99 of the Code of Civil Procedure, 1908, provides that no decree shall be reversed or substantially varied, nor shall any case be remanded in appeal, on account of any misjoinder of parties or causes of action, or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court. Now, the High Court has decided that the trial of the suit on the alternative causes of action is sanctioned by the law, and it is not suggested that the alleged misjoinder of the causes of action has affected the merits of the case or the jurisdiction of the Court. The issue is now narrowed down to the simple point whether, even if there was a misjoinder,

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their Lordships should, on that ground, reverse the decree granted by the High Court. The provisions contained in the Civil Procedure Code do not regulate the procedure of their Lordships in hearing appeals from India, but there can be no doubt that the rule embodied in S. 99 proceeds upon a sound principle, and is calculated to promote justice; and their Lordships are not prepared to adopt a course which would merely prolong litigation. Assuming that the High Court has erred in over-ruling the objection to the amendment and in upholding the trial on both the causes of action, they do not think that the trial should be rendered abortive, when the alleged misjoinder has affected neither the merits of the case nor the jurisdiction of the Court.

The next question for determination is whether Giri Bala has established her title to the village in dispute, and the answer to that question depends upon the *factum* and the validity of the will alleged to have been made, on the 5th April, 1914, by her father-in-law, Ganesh Prasad, upon which she founds her claim.

[His Lordship discussed the evidence and concluded:]

Their Lordships, therefore, agree with the High Court that the issue as to the *factum* of the will must be decided in favour of the plaintiff.

The validity of the will is challenged on the ground that the testator had no authority to dispose of the property, as it belonged to a Hindu coparcenary consisting of himself and his son. It is common ground that the property was inherited by Ganesh Prasad from his maternal grandfather, Jadu Ram, and the question arises whether it was ancestral in his hands in the sense that his son acquired therein an interest by birth jointly with him. There is a diversity of judicial opinion upon this question in India, vide, *inter alia, Karuppai Nachiar* v. *Sankaranarayanan Chetti and others*[1], *Jamna Prasad* v. *Ram Partab*[2] and *Bishwanath* v. *Ganjadhar*[3]. The matter is of considerable practical importance, and their Lordships think that it should not be left in a state of uncertainty.

Counsel for the appellants argues that the property inherited by a daughter's son from his maternal grandfather is ancestral property, and he relies, in support of his argument,

1. (1903) 13 M.L.J. 398: I.L.R. 27 Mad. 300 (F.B.).
2. (1907) I.L.R. 29 All. 667.
3. (1917) 3 Pat.L.J. 168.

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upon the expression "ancestral property" as used in the judgment of this Board in *Raja Chelikani Venkayyamma Garu* v. *Raja Chelikani Venkataramanayyamma*[1], in describing the property which had descended from the maternal grandfather to his two grandsons. It is to be observed that the grandsons referred to in that case were the sons of a daughter of the propositus, and constituted a coparcenary with right of survivorship. On the death of their mother they succeeded to the estate of their maternal grandfather, and continued to be joint in estate until one of the brothers died. Thereupon, the widow of the deceased brother claimed to recover a moiety of the estate from the surviving brother. The question formulated by the Board for decision was, whether the property of the maternal grandfather descended, on the death of his daughter, to her two sons jointly with benefit of survivorship, or in common without benefit of survivorship. This was the only point of law which was argued before their Lordships, and it does not appear that it was contended that the estate was ancestral in the restricted sense in which the term is used in the Hindu Law. Their Lordships decided that the estate was governed by the rule of survivorship, and the claim of the widow was, therefore, negatived. The brothers took the estate of their maternal grandfather at the same time and by the same title, and there was apparently no reason why they should not hold that estate in the same manner as they held their other joint property. The rule of survivorship, which admittedly governed their other property, was held to apply also to the estate which had come to them from their maternal grandfather. In these circumstances it was unnecessary to express any opinion upon the abstract question of whether the property, which a daughter's son inherits from his maternal grandfather, is ancestral property in the technical sense that his son acquires therein by birth an interest jointly with him. This question was neither raised by the parties nor determined by the Board. It appears that the phrase "ancestral property", upon which reliance is placed on behalf of the appellants, was used in its ordinary meaning, namely, property which devolves upon a person from his ancestor, and not in the restricted sense of the Hindu Law which imports the idea of the acquisition of interest on birth by a son jointly with his father.

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1. (1902) 12 M.L.J. 299: L.R. 29 I.A. 156: I.L.R. 25 Mad. 678 (P.C.).

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There are, on the other hand, observations in a later judgment of the Board in *Atar Singh* v. *Thakar Singh*[1], which are pertinent here. It was stated in that judgment that unless the lands came "by descent from a lineal male ancestor in the male line, they are not deemed ancestral in Hindu Law". This case, however, related to the property which came from male collaterals, and not from maternal grandfather; and it was governed "by the custom of the Punjab", but it was not suggested that the custom differed from the Hindu Law on the issue before their Lordships.

The rule of Hindu Law is well-settled that the property which a man inherits from any of his three immediate paternal ancestors, namely, his father, father's father and father's father's father, is ancestral property as regards his male issue, and his son acquires jointly with him an interest in it by birth. Such property is held by him in coparcenary with his male issue, and the doctrine of survivorship applies to it. But the question raised by this appeal is whether the son acquires by birth an interest jointly with his father in the estate, which the latter inherits from his maternal grandfather. Now, Vijnanesvara, the author of Mitakshara, expressly limits such right by birth to an estate which is paternal or grand-paternal. It is true that Colebrooke's translation of the 27th sloka of the first section of the first chapter of Mitakshara, which deals with inheritance, is as follows: "It is a settled point that property in the paternal or ancestral estate is by birth." But Colebrooke apparently used the word "ancestral" to denote grand-paternal, and did not intend to mean that in the estate, which devolves upon a person from his male ancestor in the maternal line, his son acquires an interest by birth. The original text of the Mitakshara shows that the word used by Vijnanesvara, which has been translated by Colebrooke as "ancestral", is *paitamaha* (पैतामह) which means belonging to *pitamaha* (पितामह). Now, *pitamaha* ordinarily means father's father, and, though it is sometimes used to include any paternal male ancestor of the father, it does not mean a maternal male ancestor.

Indeed, there are other passages in Mitakshara which show that it is the property of the paternal grandfather in which the son acquires by birth an interest jointly with, and equal to that of, his father. For instance, in the 5th sloka of

1. (1908) 18 M.L.J. 379: L.R. 35 I.A. 206: I.L.R. 35 Cal. 1039 (P.C.).

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the fifth section of the first chapter, it is laid down that in the property "which was acquired by the paternal grandfather . . . the ownership of father and son is notorious; and, therefore, partition does take place. For, or because, the right is equal, or alike, therefore, partition is not restricted to be made by the father's choice, nor has he a double share." Now, this is the translation of the sloka by Colebrooke himself, and it is significant that the Sanskrit word, which is translated by him as "paternal grandfather", is *pitamaha* (पितामह). There can, therefore, be no doubt that the expression "ancestral estate" used by Colebrooke in translating the 27th sloka of the first section of the first chapter was intended to mean grand-paternal estate. The word "ancestor" in its ordinary meaning includes an ascendant in the maternal, as well as the paternal, line; but the "ancestral" estate, in which, under the Hindu Law, a son acquires jointly with his father an interest by birth, must be confined, as shown by the original text of the Mitakshara, to the property descending to the father from his male ancestor in the male line. The expression has sometimes been used in its ordinary sense, and that use has been the cause of misunderstanding.

The estate, which was inherited by Ganesh Prasad from his maternal grandfather, cannot, in their Lordships' opinion, be held to be ancestral property in which his son had an interest jointly with him. Ganesh Prasad consequently had full power of disposal over that estate, and the devise made by him in favour of his daughter-in-law, Giri Bala, could not be challenged by his son or any other person. On the death of her husband, the devise in her favour came into operation and she became the absolute owner of the village Kālinjar Tirhati, as of the remaining estate; and the sale of that village in execution proceedings against her husband could not adversely affect her title.

For the reasons above stated, their Lordships are of opinion that the decree of the High Court should be affirmed, and this appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondent: *Doughlas Grant & Dold.*

R. C. C. —— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE HORWILL.

In re A First Grade Pleader.*

F.B.
——
A First Grade Pleader, *In re.*

Legal Practitioners Act(XVIII of 1879), S. 13 (b)—*Pleader—Temporarily appropriating client's moneys for his private use—Petition to Court for disciplinary action—Subsequent restoration of money to client and withdrawal by him of the charges—Court, if can permit such squaring—Professional misconduct.*

Where a legal practitioner converted the moneys of his client in his hands for his private use and did not return it for some time after demand by the client, or inform the client of such conversion the practitioner is guilty of professional misconduct, and the fact that he, by a subsequent agreement with the client, restored the moneys to the client who received the same, does not make the act any the less one of professional misconduct, though the subsequent restoration of the money may have some bearing on the question of punishment. When once a case of professional misconduct has been brought to the notice of the Courts, then the charge cannot be permitted to be squared, as it is afterwards the concern of the Courts to maintain the prestige and honourable name of the legal profession.

This case came on for hearing on Wednesday, the 14th day of April, 1937, after service of notice under S. 13, cl. (*b*) of the Legal Practitioners Act, upon the respondent herein, namely, Mr. —, First Grade Pleader, Vizagapatam, calling upon him to show cause why disciplinary action should not be taken against him for his grossly improper conduct in the discharge of his professional duty in that he, in his capacity as Pleader, engaged by A. Mallikarjunudu, decree-holder in O. S. No. 356 of 1932 on the file of the Court of the District Munsif of Bhimavaram, for executing the said decree, had with him a sum of Rs. 70-10-0 to the credit of the said client, that he fraudulently and dishonestly misappropriated the said amount of his client to his own use and did not return it despite several demands, that he displayed gross negligence in the matter of conducting the execution petition against one Satyanarayanaraju, entrusted to him by his said client, that he displayed gross negligence in not opposing the adjudication of the said Satyanarayanaraju as an insolvent, though requested by his client to do so, and that he dishonestly and fraudulently showed a sum of Rs. 6-8-0 as "Sadar" in his statement of account furnished to his said client on 4th February, 1934,

* *In the matter of* A 1st Grade Pleader, Vizagapatam. 21st April, 1937.

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upon perusing the report of the District Judge of Vizagapatam dated 12th February 1937, and the connected papers in the case.

R. Ramamurti for *The Advocate-General* in support of the notice.

Kasturi Seshagiri Rao, Advocate for *The First Grade Pleader* in question.

The complainant not appearing in person or by pleader.

The order of the Court was made by

Beasley, C.J.

The Chief Justice.—These proceedings relate to a sum of Rs. 70-10-0 which belonged to one Aletti Mallikarjunudu, a client of the respondent and which sum the respondent by a letter of the 4th February, 1934 (Ex. A-3) admitted that he had in his possession. The respondent did not return that money to his client in spite of the repeated requests in writing to do so and eventually the client sent a registered letter of demand on 24th December, 1934, which the postal acknowledgment shows was received on 2nd January, 1935, by the respondent. This registered letter, however, did not produce any reply. A further registered letter was sent to the respondent on 14th March, 1935, demanding the return of Rs. 65 within four days and telling him to hand over the papers in the suit to another Advocate at Vizagapatam and that he was to take no further steps with regard to this suit. This letter is shown by the postal acknowledgment to have been received by the respondent on 19th March, 1935. No reply was made to this letter also. Eventually on 11th June, 1935, a petition against the respondent was presented to the District Munsiff of Vizagapatam by the client A. Mallikarjunudu setting out the facts and stating that the petitioner believed that the respondent had appropriated his funds for his own needs. He further charged him with not opposing an insolvency petition filed by the judgment-debtor in the suit in which the respondent had acted on the petitioner's behalf in spite of his instructions. Subsequently the petitioner met the respondent in October, 1935, and then the latter admitted that he had used the money temporarily for his own sudden and unforeseen private purpose, namely, for his journey to a village in West Godavari in connection with his father-in-law's sudden death and said that he thought that the petitioner would not mind his using the money for such a sudden private purpose. It appears that the petitioner after this explanation readily forgave the

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appropriation of the money and it was arranged that of the amount owing Rs. 40 was to be paid in cash and the remaining Rs. 30-10-0 would be kept by the respondent in payment of future professional work to be done by him. The Rs. 40 cash payment is represented by payments in two instalments of Rs. 20 each in October, 1935. Subsequently an endorsement was made on Ex. A-4, which is the copy of an account furnished by the respondent to the petitioner on 4th February, 1934, as follows:—

"The matter has been adjusted, and it need not be pressed".

There seems to be some confusion with regard to this endorsement which is Ex. A-7 as the District Judge states in his report that when asked by his predecessor Mr. Lancashire on 22nd July, 1936, about his petition the petitioner endorsed on it that the matter had been adjusted and the petition was not pressed. It would appear from this that the endorsement was made upon the petition and not on Ex. A-4. However that is immaterial. The position that time was, therefore, that the respondent had had in his hands money belonging to his client for a considerable time and that in spite of repeated demands did not return the money to him but instead upon some date about which no information has been given by him he used his client's money for his own purposes and did so without having first of all obtained his client's permission to do so or told him about it after he had done so. This was, therefore, a clear case of the wrongful use for his own purposes, by a legal practitioner of his client's money; and it is obvious that the money was so used because the legal practitioner had not sufficient money of his own. That these facts disclose a case of professional misconduct is obvious; and although the respondent may have been accused by the client of fraudulently and dishonestly using the money, it is not necessary that fraud or any other criminal offence should be proved. It is sufficient if it is shown that a legal practitioner has intentionally used his client's money for his own purposes without his client's permission; and it is quite unnecessary to consider whether he did so with any intention of defrauding his client. He may have every intention of restoring the money to his client later on but he is nevertheless guilty of professional misconduct in converting the money to his own use even temporarily. It is not out of place to observe that it

is probable that in most cases which end disastrously for persons entrusted with the money of others there is an original intention to restore the money. The clerk entrusted with his master's money may gamble with it hoping that the gamble will be successful in which case he returns his master's money and his master remains in ignorance of the use to which it was temporarily put. But gambles are not so often successful and the money cannot be returned and disaster is the result. Legal Practitioners who have in their hands the money of their clients must under no circumstances utilise that money for their own purposes without the sanction of their clients; and even to take a loan from a client is undesirable, so much so that in the

" Instructions to the members of the Bar issued by the Madras Bar Council dated 2nd April, 1933."

It is laid down that

" Practitioners should avoid arrangements by which clients' moneys in their hands are converted into loans. But in no case should such conversion be made without the previous consent in writing of the client."

This instruction was given in pursuance of views expressed by the judges of this High Court. That being so, how is the charge of misconduct affected by the amicable settlement of the matter come to between the petitioner and the respondent once such an offence has been brought to the notice of the Court? The answer is that, when once an act of professional misconduct has been committed such as the one here, any subsequent agreement by the legal practitioner to restore the money and his client to receive it back does not make the act any the less one of professional misconduct though the subsequent restoration of the money may have some bearing on the question of punishment. When a case of professional misconduct has been brought to the notice of the Courts, then the charge cannot be permitted to be "squared". Clients whose money legal practitioners have wrongly utilised have no interest at all except to get their money back, and if they do, are quite prepared to withdraw the charges. They are not in the least degree interested in any rules of professional conduct, although many of these are framed for the benefit of the public, nor do they care anything about the prestige and honourable name of the legal profession and where the disciplinary functions of the Courts have been invoked and the money has been returned to them, they are not interested in

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the control of the Courts over legal practitioners. This however is the concern of the Courts; and mere restoration of the money to the client by a legal practitioner who has improperly used it for his own purposes cannot be any ground for allowing the withdrawal of such a charge. The Court's concern is to exercise its control over legal practitioners who have converted their client's money to their own use; the client's concern is to get his money back. We have dealt with this topic at some length because it has been made clear to us not only in these proceedings but in similar proceedings that there is an impression that charges like this when they have once been made, to the Court, can be "squared" in the same way as this obviously has been, and we are all the more constrained to say what we have because it appears to us that to some extent the District Judge is under the same misapprehension. He finds that the legal practitioner appropriated this money to his own sudden and unexpected private use in the *bona fide* belief that his client would not mind it in the circumstances and without any fraudulent or dishonest intent to misappropriate the amount and further that he foolishly detained the money and failed to reply to his client's letters owing to his pique at another vakil having been engaged and was expecting his client to go to him in person and was intending to return the money then after some rebuke for having engaged another vakil. He thinks that the legal practitioner believed that his client would approve of this diversion of his funds for his own private purpose in the special circumstances and that this cannot be said to be wholly unreasonable in view of the relationship as lawyer and client and the sudden death and the consequent urgent journey rendered necessary by it and indeed his client's readily forgiving the diversion is itself proof, he thinks, of the unreasonableness of the legal practitioner's belief. In other words, in order to escape serious consequences of his conduct a legal practitioner who converts his client's money to his own use has only got to say that he thought that his client would not object to its use in that way and subsequently by agreeing to repay the money to his client obtain his client's forgiveness. The District Judge in the end certainly says that the legal practitioner deserves to be severely censured for utilising his client's money for his private use without having previously obtained his client's permission to do so. We are quite unable to understand why in the circumstances of this case the District

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Judge should think that the legal practitioner's belief that this client would not object to the use of his money by him was reasonable or even *bona fide.* The circumstances to which we refer are his studied neglect to tell his client that he had done so or to comply with his client's demands to return the money or even to reply to them and his obvious difficulty in repaying only a part of the money in October, 1935. The reasonableness of the legal practitioner's belief and his *bona fides* at the time when he so used the money seem to us to be better tested by these latter facts than by the subsequent forgiveness of his conduct by his client upon his agreeing to restore the money to him. We on the contrary think that the legal practitioner's belief was not a reasonable one at all and indeed it is difficult to accept his statement that he had such *bona fide* belief. We are clearly of the view that the legal practitioner was guilty of professional misconduct and, were it not for the fact that the suspension of the renewal of his sanad pending the proceedings in this High Court, has resulted in his being unable to practice for some time we should not be satisfied with the punishment proposed by the District Judge, namely, severe censure. We think, however, that in view of what we have stated no further punishment need be inflicted upon him. The order of the Court is that Mr. —, First Grade Pleader, Vizagapatam, is severely censured for his conduct.

S. V. V. —— *Pleader censured.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE MOCKETT.

R. M. P. R. A. P. R. Kasi Chettiar
alias Perichiappa Chettiar .. *Appellant** (*Defendant*)

v.

V. A. L. V. Ramasami Chetti Firm
by its managing partner V. A. L.
V. Ramasami Chettiar .. *Respondent* (*Plaintiff*).

Kasi Chettiar *v.* Ramasami Chetti Firm.

Mortgage—Security bond executed by uncle of defendant—Defendant raising the plea that some items belonged not to the joint family properties—Issues raised—Whether defendant could be allowed to question title of mortgagor.

In a suit to enforce the charge created by a security bond executed by the uncle of the defendant to secure payment of moneys to plaintiff on dealings that had gone on between the uncle of the defendant and the plaintiff, the

* Appeal No. 74 of 1931. 11th August, 1936.

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defendant contended that he and his uncle were members of an undivided Hindu family, but that two items included in the security bond could not be made subject of the security as one was a self-acquisition of his own father and that in another his uncle had only one-sixth share. Some issues raised the questions whether the said items were of the joint family. The lower Court refused to record findings on those issues holding that they should be agitated in a separate suit but held on another issue raised, that the defendant in his capacity as legal representative of his uncle was estopped from questioning his uncle's title to the mortgaged properties.

Held, that the case was eminently a fit one for the questions raised by the issues on which findings were not given by the lower Court being tried before the security properties were brought to sale. Hence appeal was to be remanded for fresh trial.

The rule as to exclusion of a claim by way of a title paramount is not absolute or is subject to exceptions. Even if one should prefer not to state that the sale is subject to exceptions, much the same result will follow from holding that the reference to 'title paramount' in this connection must be taken only to exclude a claim by strangers whose interest in the property can in no circumstances be affected by the act of the mortgagor. In view of the personal laws of the parties, such a clear cut distinction does not of law exist in litigation in this country. It often happens that in one set of circumstances a mortgagor would have had power to impose a charge upon certain properties even to the extent of binding the interests of other persons therein but in another set of circumstances he might not have had such power; in such cases the defendant will stand to gain if the Court upholds his plea that the circumstances of the case were of the latter kind whereas he would be bound by the mortgage if the circumstances were of the former kind. A claim of self-acquisition by a member of a joint Hindu family can by no means be put on the same footing as a claim by a stranger to the mortgage because even if that plea is negatived, the claimant will still have an interest in the property which may be bound by the decree in the suit.

Doraiswami Aiyangar v. *Varadarajulu Naidu*, (1927) 53 M.L.J. 647: A.I.R. 1928 Mad. 2; *Muthiah Servai* v. *Somasundaram Chettiar*, A.I.R. 1928 Mad. 199(2); *Ramaswami Pillai* v. *Marimuthu Goundan*, A.I.R. 1928 Mad. 764 and *Veeraraghavalu* v. *Suryanarayana*, A.I.R. 1936 Mad. 338, referred to.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Devakotta, dated 16th day of April, 1930, and passed in O. S. No. 93 of 1928.

K. Rajah Aiyar and *V. Ramaswamy Aiyar* for Appellant.

M. Patanjali Sastri and *T. K. Sundararama Aiyar* for Respondent.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This appeal arises out of a suit brought to enforce the charge created by a security bond (Ex. H) dated 1st May, 1925, executed by one Lakshmanan Chettiar, the uncle of the defendant, to secure repayment of moneys due on dealings that had gone on for some years between Lakshmanan Chettiar and the plaintiff. The plaint stated generally in paragraph 2 that Lakshmanan Chettiar died

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without issue leaving no other heir except the defendant and that the defendant has succeeded to and has been enjoying the properties of the deceased Lakshmanan Chettiar as his heir. The defendant contended that he and Lakshmanan Chettiar were members of an undivided Hindu family, that, of the two items included in the security bond, item I was the self-acquisition of his father and could not therefore be subjected to a charge by Lakshmanan Chettiar, that item II was the joint property of the two branches to the extent of one-third and that the security bond could accordingly bind only Lakshmanan Chettiar's one-sixth share in item II.

Of the issues framed in the case, issues 1 to 3 related to the dealings alleged in the plaint and to the truth of the security bond. Issues 4, 5 and 6 raised the questions which we have above set forth from amongst the defences raised by the defendant. Issue 7 runs as follows:—

" Whether the defendant is not estopped from questioning the title of the deceased Lakshmanan Chetti to the properties detailed in the security bond? "

We are not concerned in this appeal with the findings of the lower Court on issues 1 to 3. On issues 4, 5 and 6 the lower Court declined to record findings, holding that they must be agitated in a separate suit, because the questions raised by them were really in the nature of a plea of a title paramount. On issue 7 the lower Court held that the defendant in his character as the legal representative of Lakshmanan Chettiar was estopped from questioning Lakshmanan Chettiar's title to the mortgaged properties.

The defendant who has appealed to this Court contends that there is no hard and fast rule by which the trial of issues 4, 5 and 6 should be relegated to another suit and that it will be in the interests of all parties to have the questions raised by them decided in this suit, so that in one view he may have the opportunity of saving the property by paying off the amount due under the security bond and also that before the sale takes place in execution of the decree, all persons interested may know what exactly is being brought to sale. In the circumstances of the case, there can be little doubt as to what is the most convenient course. It will scarcely be worth the while of a court auction-purchaser unless he is a speculator to purchase in execution of a decree directing the sale of the properties without knowing whether the mortgagor had any

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title thereto or not and the price fetched at such a sale will in all probability be so low as to cause loss both to the plaintiff and to the defendant.

On behalf of the respondent Mr. Patanjali Sastri has, however, argued that the question of the propriety of trying these issues in this suit cannot be determined merely on grounds of convenience but must be decided in the light of the well-established principle that in a suit to enforce a mortgage any pleas in the nature of a claim by way of title paramount are not to be introduced. Our attention was drawn to several reported decisions wherein the Courts have held either that the plea should be excluded in the particular case or that the plea could be tried in the circumstances of the particular case. In some decisions learned judges have stated that the rule as to the exclusion of a claim by way of title paramount is not absolute or is subject to exceptions (cf. *Nafar Chandra Kundu* v. *Ratnamala Debi*[1] and *Zakir Raza* v. *Madhusudan Dass*[2]). The point has been dealt with in three or four recent judgments of this Court at some length and the leading cases have been reviewed (see *Doraiswami Aiyangar* v. *Varadarajulu Naidu*[3], *Muthiah Servai* v. *Somasundaram Chettiar*[4], *Ramaswami Pillai* v. *Marimuthu Goundan*[5] and also *Veeraraghavalu* v. *Suryanarayana*[6]). It is therefore unnecessary to refer to the cases again. Even if one should prefer not to state that the rule is subject to exceptions, much the same result will follow from holding that the reference to 'title paramount' in this connection must be taken only to exclude a claim by *strangers* whose interest in the property can in no circumstances be affected by the act of the mortgagor. In view of the personal laws of the parties, such a clear cut distinction does not often exist in litigations in this country. It often happens that in one set of circumstances a mortgagor would have had power to impose a charge upon certain properties even to the extent of binding the interests of other persons therein but in another set of circumstances he might not have had such power; in such cases the defendant will stand to gain if the Court upholds his plea that the circumstances of the case were of the latter kind whereas he would be bound by the mortgage if the circumstances were of the former kind. A claim of self-acquisition

1. (1910) 13 C.L.J. 85.
2. (1918) 45 I.C. 691.
3. (1927) 53 M.L.J. 647: A.I.R. 1928 Mad. 2.
4. A.I.R. 1928 Mad. 199.
5. A.I.R. 1928 Mad. 764.
6. A.I.R. 1936 Mad. 338.

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by a member of a joint Hindu family can by no means be put on the same footing as a claim by a stranger to the mortgage because even if that plea is negatived, the claimant will still have an interest in the property which may be bound by the decree in the suit. We are of opinion for the reasons above given that this is eminently a fit case for the questions raised by issues 4, 5 and 6 being tried before the security properties are brought to sale. We accordingly remand the case to the lower Court for the trial of issues 4, 5 and 6. Its finding on issue 7 must be understood as not to preclude the trial of these issues.

Mr. Patanjali Sastri suggests that if the question as to whether the security properties are joint family properties or not should be permitted to be tried in this action it is only fair that his client should have the opportunity of alleging and proving that the circumstances under which and the purpose for which the security bond was executed were such as to bind the whole interest of the joint family in those properties even if they were joint family properties. The plaintiff did not anticipate this line of defence and even after the written statement was filed no reply statement was filed raising this question; but as we are remanding the case for trial of issues 4, 5 and 6 the plaintiff may be given an opportunity to file any reply statement on these lines above suggested and the defendant will also be at liberty to file his answers thereto and, if necessary, additional issues may be framed with reference to the contentions thus raised.

The lower Court will embody in its revised decree appropriate declarations in pursuance of its findings on issues 4, 5 and 6 and the new issues, if any. The costs of this appeal will abide the result of the trial of issues 4, 5 and 6 and the new issues and will be provided for in the revised decree of the lower Court.

The memorandum of objections relates to the lower Court's direction as to costs, but on the footing on which the trial in the lower Court proceeded that order was appropriate. The memorandum of objections must therefore be dismissed with costs.

The court-fee paid on the memorandum of appeal will be refunded.

K. C. —— *Case remanded and Memo. of objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Mohamad Yusuf and others .. *Appellants** (*Plaintiffs*)

v.

Narayana Pillai (died) and others .. *Respondents* (*Defendants*).

Mohamad Yusuf *v.* Narayana Pillai.

Limitation Act (IX of 1908), S. 20, cl. (2)—Prior mortgage—Decree and sale of property—Purchase by and delivery of possession to plaintiff—Subsequent mortgagee's suit after—Decree directing sale of the property subject to previous mortgage—Suit by plaintiff on the original mortgage after twelve years—Suit barred.

A property was first mortgaged in 1903 to one *N* and subsequently to *S* in 1905. In 1906 *N* instituted a suit on the mortgage without impleading *S*, the second mortgagee, and in execution of his decree thereon obtained, purchased the property in 1908 and took delivery also in 1909. In 1915 the suit property was sold to plaintiff's father and was in plaintiff's family's possession up to 1928 when plaintiff was dispossessed in execution of the decree obtained by the fourth defendant herein. *S*, the second mortgagee, had assigned his mortgage in favour of the fourth defendant in 1910, who had filed a suit for realisation of moneys due under the mortgage. He impleaded plaintiff as a party defendant and a decree for sale was obtained which directed sale subject to previous mortgage on the property. In 1928 he obtained delivery of possession from plaintiff. Hence the present suit by the plaintiff was brought for recovery of money on the original mortgage of 1903.

Held, that the suit was barred by limitation *prima facie*, having been brought on a mortgage of 1903. In the suit instituted by the fourth defendant there was a final decree of a competent Court directing sale of property subject to previous mortgage. Whether that decision was right or wrong, the fourth defendant acquiesced in the judgment and it would not be open to him to contend now that under the said decree no rights were conferred on the plaintiff. The result of the decree obtained by the fourth defendant was that the mortgage of *N* must be deemed to subsist and that plaintiff must be deemed to be an assignee of *N's* mortgage and also of the ultimate equity of redemption. For the applicability of S. 20, cl. (2) of the Limitation Act the perception of rents and profits must be by a person in the capacity of a mortgagee. Where a person was also the owner of the property, as the present plaintiff was, the perception of rents and profits by him would not be said to have been only in the capacity of a mortgagee.

The property having been sold and purchased by *N* before the new Code of Civil Procedure, all rights as mortgagee became extinguished and *N* and his assigns should be deemed to have been in possession of the property only as purchasers and not as mortgagees and therefore S. 20, cl. (2) of the Limitation Act would not be applicable.

Bama Charan v. *Kishore Mohan Roy*, (1921) 64 I.C. 903 and *Ram Charan* v. *Bhagwan Das*, (1926) L.R. 53 I.A. 142: I.L.R. 48 All. 443 (P.C.), distinguished.

Second appeal against the decree of the District Court of East Tanjore at Negapatam in A.S. No. 168 of 1931 preferred

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* S. A. No. 558 of 1932. 26th February, 1937.

Mohamad Yusuf v. Narayana Pillai.

against the decree of the Court of the District Munsiff of Negapatam in O.S. No. 210 of 1930.

K. Rajah Aiyar, K. Aravamuda Aiyangar and *N.R. Raghavachariar* for Appellants.

G. Jagadeesa Aiyar and *G. Ramanatha Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The question involved in this second appeal is one of limitation. The facts necessary for its disposal may be briefly stated. The suit property belonged to one Doraisami Pillai who mortgaged it to one Narayanasami Aiyar in 1903. Subsequent to this mortgage, Doraisami Pillai executed another mortgage of the said property and some other property in favour of one Swaminatha Pillai in 1905. In 1906, Narayanasami Aiyar instituted a suit on his mortgage, O.S. No. 265 of 1906 on the file of the District Munsiff's Court of Tiruvarur, without impleading the second mortgagee Swaminatha Pillai, and in execution of the decree obtained thereon, purchased the property in 1908 and took delivery of the same in March, 1909. In 1915 the suit property was sold to the plaintiff's father and it was in the possession of the plaintiff's family till 1928, when the plaintiff was dispossessed in execution of the decree obtained by the fourth defendant. Swaminatha Pillai assigned his mortgage in 1910 to the fourth defendant who filed O. S. No. 33 of 1920 in the Sub-Court of Mayavaram for the realisation of the monies due under the mortgage. He therein impleaded the plaintiff as a party defendant to the suit. A decree for sale was passed therein and it was confirmed by the appellate Court in appeal and the appellate decree (Ex. D) ran thus:

"The mortgaged property hereunder described be sold subject to the prior mortgage of Ex. 1 on which Narayanasami Aiyar had obtained a decree in O. S. No. 265 of 1906 on the file of the Tiruvarur District Munsiff's Court."

The fourth defendant applied for execution of the decree which he obtained and brought the suit property to sale subject to the mortgage in favour of Narayanasami Aiyar and purchased the property and obtained delivery of possession in July, 1928. The plaintiff having been dispossessed filed the present suit for recovery of the money due on the mortgage, Ex. A. The main defence is one of limitation. *Prima facie*, the suit being on the mortgage of 1903, it is certainly barred

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by limitation. But Mr. Rajah Aiyar contends that the date of dispossession gave him a new cause of action. In support of this he relies on a recent decision of this Court in *Sambasiva Aiyar* v. *Subramania Pillai*[1]. In that case Ramesam and Stone, JJ., held that where a prior mortgagee institutes a suit on his mortgage without impleading the puisnee mortgagee or a purchaser of a portion of the equity of redemption and the property is sold and purchased either by the prior mortgagee or by a stranger, there are two courses open to the prior mortgagee or the purchaser in execution of the decree:

(1) to sue on the mortgage, in which case, the suit has to be brought within twelve years from the time when the mortgage amount becomes due and payable, or

(2) to proceed on the cause of action derived from his title as auction-purchaser, in which case, the date of the execution sale or the date of resistance to delivery of possession in pursuance of the sale might furnish the starting point for limitation.

Madhavan Nair, J., in *Gopalan Nair* v. *Moideen Madar*[2] would seem to suggest that the starting point for limitation must be computed only from the date of the sale certificate. But it is unnecessary to go into this question because the suit is specifically based on the mortgage and could only be based on the mortgage in view of Ex. D. The action would therefore be barred unless there is an acknowledgment of liability or payment of interest to save limitation. What is relied on is that between 1903 the date of taking delivery of possession by Narayanasami Aiyar in execution of his mortgage decree, up to the date of the dispossession by the fourth defendant, the plaintiff and his predecessor-in-title were in possession of the property and in receipt of rents and profits thereon and therefore, the perception of such rents and profits would save limitation by virtue of S. 20, cl. (2) of the Limitation Act which runs thus:

> "Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-S. (1)".

The learned District Judge in the Court below overruled the contention on the ground that the property having been sold and purchased by Narayanasami Aiyar before the new

1. (1935) I.L.R. 59 Mad. 312. 2. A.I.R. 1935 Mad. 680.

Code of Civil Procedure, all rights as mortgagee became extinguished and Narayanasami Aiyar and his assigns must be deemed to have been in possession of the property only as purchasers and not as mortgagees and therefore S. 20, cl. 2 of the Limitation Act is not applicable to the case. It is no doubt true under the law as it previously stood before the enactment of the Civil Procedure Code of 1908 on the passing of decree for sale on foot of the mortgage, all rights to the mortgage security are extinguished and the only right thereafter is a right to a sale of the property conferred by the decree. But in the suit instituted by the fourth defendant there was a final decree of a competent Court in and by which the suit property was directed to be sold subject to the mortgage in favour of Narayanasami Aiyar. Whether this decision is right or wrong, the fourth defendant acquiesced in the judgment and it would not be open to him to contend now that under the said decree no rights were conferred on the plaintiff. (Vide *Sukhi* v. *Ghulam Safdar Khan*[1].) The result of the decree obtained by the fourth defendant is that the mortgage of Narayanasami Aiyar must be deemed to subsist and that the plaintiff must be deemed to be an assignee of Narayanasami Aiyar's mortgage and also of the ultimate equity of redemption, that is, the assignee of the rights of the mortgagor in the property. For the applicability of S. 20, cl. 2 of the Limitation Act the perception of rents and profits must be by a person in the capacity of a mortgagee. Where a person was also the owner of the property, as the present plaintiff was, the perception of rents and profits by him cannot be said to have been only in the capacity of a mortgagee. Mr. Rajah Aiyar relied on a decision of the Calcutta High Court, namely, *Bama Charan* v. *Kishore Mohan Roy*[2]. In that case after the preliminary mortgage decree for sale, the mortgagor entered into an agreement to transfer the equity of redemption to the mortgagee in satisfaction of the decree. In pursuance of the agreement, the mortgagee entered into possession but no transfer was effected and the mortgagor sold the property to a third party who dispossessed the mortgagee. On an application for a final decree, the question arose whether the perception of rents and profits by the mortgagee while he was in possession would not prevent the application from being barred by virtue

1. (1921) 42 M.L.J. 15: L.R. 48 I.A. 465: I.L.R. 43 All. 469 (P.C.).
2. (1921) 64 I.C. 903.

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of S. 20, cl. 2 of the Limitation Act. The learned Judges held it would. In that case the learned Judges observed:

"S. 20, cl. 2' may well be construed to apply wherever mortgaged land is, in fact, in the possession of the mortgagee".

This observation must be deemed to have been made with reference to the facts of that case. The contract for sale was not legally carried into effect and the mortgagee never obtained a title to the equity of redemption, so as to become full owner of the property and he could have been in possession only as a mortgagee. But in this case, so far as the mortgagor was concerned there was a valid transfer of the equity of redemption in favour of Narayanasami Aiyar.

Another case relied on by Mr. Rajah Aiyar was *Ram Charan* v. *Bhagwan Das*[1]. It would be seen from the facts of that case that a sale-deed executed in pursuance of a decree of Court in a suit for specific performance against the Kartha of a joint family was set aside at the instance of junior members. Part of the consideration went in discharge of a simple mortgage which was admitted binding on the family. To adjust equities between the parties by reason of the fact that the sale must be treated as not binding on the plaintiffs in that case, their Lordships of the Judicial Committee held that one of the terms on which the sale should be set aside should be that the vendee should have the full benefit of the mortgage which has been discharged and the possession of the property, although unwarranted, as a purchaser should not be treated as that of a mortgagee in possession with all the burdens of such a possession. In this view the vendee was not held accountable for profits, nor would he be entitled to any interest. This case therefore proceeds on the footing that the sale being invalid the vendee must be treated as a mortgagee in possession and does not help Mr. Rajah Aiyar.

The plaintiff's suit is therefore barred by limitation. In the result the second appeal fails and is dismissed with costs.

Leave refused.

K. C. —— *Appeal dismissed.*

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1. (1926) L.R. 53 I.A. 142: I.L.R. 48 All. 443 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Marudamuthu Poosari and another .. *Petitioners** (*Petitioners*)

v.

The Hindu Religious Endowments Board, Madras, represented by its President and others .. *Respondents* (*Respondents*).

Marudamuthu Poosari *v.* H. R. E. Board, Madras.

Religious Endowments Board Act (II of 1927), S. 84—Application in Civil Court to set aside order of dismissal under S. 84 (1)—O. 9, Civil Procedure Code, applicable to the application—Petition can be restored to file if on merits there was sufficient cause.

It is in a sense right to say that the Religious Endowments Act is self-contained, that is, the provisions of the Civil Procedure Code will not by their own force apply to every inquiry to be conducted by the authorities appointed or constituted under the Act. But when the Act allows suits or applications to be filed in a Civil Court in relation to matters arising under the Act, the principle that the Act is self-contained is irrelevant to the question of the procedure to be followed by the Civil Court in dealing with such applications or suits. On the other hand it will be illogical to expect in the Endowments Act a provision to the effect that a suit brought in a Civil Court will be governed by Civil Procedure Code. Applications in a Civil Court will not stand on a different footing. All that can be said is that in dealing with suits, the Court will follow the procedure applicable to suits and in dealing with applications, the Court will follow the procedure applicable to applications. It is on the principle that once a matter comes before a regular Civil Court its further course will be governed by the provisions of the Code, that second appeals have been permitted from decisions of District Courts in cases under Rent Recovery Act and in appeals under the Forest Act.

Narayana Aiyangar v. *Desikachariar,* (1933) 65 M.L.J. 315, relied on.

Where an application was made to the lower Court to set aside the dismissal of a petition which had been presented to it under S. 84 (1) of the Religious Endowments Act and the District Judge though feeling on the merits sufficient grounds to restore the petition felt constrained to dismiss it because he was of opinion that O. 9 of the Civil Procedure Code did not apply to the case.

Held, that the order of the lower Court should be set aside and the petition restored to file.

Anantharaju Shetty v. *Appu Hegade,* (1919) 37 M.L.J. 162, distinguished.

Rajagopala Chettiar v. *H. R. E. Board, Madras,* (1933) 66 M.L.J. 43 : I.L.R. 57 Mad. 271 (F.B.), explained.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of West Tanjore dated the 10th day of July, 1934, and made in I.A. No. 191 of 1934 in O. P. No. 86 of 1932.

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* C. R. P. No. 1710 of 1934. 19th March, 1937.

Marudamuthu Poosari *v.* H. R. E. Board, Madras.

K. S. Desikan and *R. Viswanathan* for Petitioners.

P. V. Rajamannar for Respondents.

The Court delivered the following

JUDGMENT.—This Revision Petition arises out of an application made to the lower Court to set aside the dismissal of a petition which had been presented to it under S. 84 of the Religious Endowments Act. The learned District Judge was evidently prepared, so far as the merits of the application went, to hold that there was sufficient cause for restoring the O.P.; but he felt constrained to dismiss the I.A. because he was of opinion that O. 9, Civil Procedure Code, did not apply to the case before him. I think that this view of the learned Judge rests upon a misapprehension.

It is in a sense right to say that the Religious Endowments Act is self-contained, that is, that provisions of the Civil Procedure Code will not by their own force apply to every enquiry to be conducted by the authorities appointed or constituted under that Act. But when that Act allows suits or applications to be filed in a Civil Court, in relation to matters arising under the Act, the principle that the Act is self-contained is irrelevant to the question of the procedure to be followed by the Civil Court in dealing with such applications or suits. This will be clearly realised when one bears in mind that there are several sections in the Endowments Act relating to suits to be brought in the Civil Court. I do not suppose anybody will contend that such suits will not be governed by the provisions of the Code, in the absence of a special provision to that effect in the Endowments Act. On the other hand, it seems to me illogical to expect in the Endowments Act a provision to the effect that a suit brought in a Civil Court will be governed by the Civil Procedure Code. I do not see how applications to the Civil Court will stand on a different footing. All that can be said is that in dealing with suits, the Court will follow the procedure applicable to suits and in dealing with applications, the Court will follow the procedure applicable to applications. It is on the principle that once a matter comes before a regular Civil Court its further course will be governed by the provisions of the Code that second appeals have been permitted from the decisions of District Courts in cases under the Rent Recovery Act and in appeals under the Forest Act. Much

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the same principle was recognised by a division Bench of this Court in *Narayana Iyengar* v. *Desikachariar*[1] though other reasons were also given in support of the decision.

The learned Counsel for the respondent invited my attention to the decision in *Anantharaju Shetty* v. *Appu Hegade*[2]. The basis of that judgment is not that the Civil Procedure Code cannot be made applicable at all but it is only the provisions relating to the procedure to be followed by the Court that will apply in such cases but not the provisions relating to appeal, review and so on. It is not necessary for me to say whether this distinction between one part of the Code and another part of the Code is justifiable or not; but that distinction does not affect the decision of the present case. It must also be remembered that that case related to proceedings under S. 10 of the Old Religious Endowments Act (XX of 1863). Though it has been held that even when exercising the powers under that section, the District Court was acting as a Court and not as a *persona designata*, there can be very little doubt that a proceeding of that kind is substantially different from applications and suits which are provided for in the present Religious Endowments Act. The Full Bench judgment in *Rajagopala Chettiar* v. *H. R. E. Board, Madras*,[3] proceeded on the footing that the provisions of the Code are applicable to these suits and applications, though the right of appeal was negatived in respect of applications under S. 84, on the footing that an order on such an application was not a decree within the meaning of the Civil Procedure Code.

The order of the learned District Judge is set aside and he is directed to restore the original petition to file and proceed to dispose of it on the merits. Costs to abide.

K. C. *Order set aside.*

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1. (1933) 65 M.L.J. 315. 2. (1919) 37 M.L.J. 162.
3. (1933) 66 M.L.J. 43 : I.L.R. 57 Mad. 271 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

The Secretary of State for India in Council represented by the Collector of Tinnevelly .. *Appellant* in S.A. No. 1164 of 1931 and Respondent in S. A. No. 1265 of 1931 on the file of the High Court (Plaintiff)*

v.

R. S. S. Narayana Aiyar and another .. *Respondents in S. A. No. 1164 of 1931 and Appellants in S. A. No. 1265 of 1931 on the file of the High Court (Defendants).*

Secretary of State for India in Council *v.* Narayana Aiyar.

Water rights—Government channel—Channel passing thrugh an inam villcge—Channel in existence from before inam grant—Ownership of the bed of the channel—If in inamdar or the Government—Powers and limits of inamdar and Government to interfere with the channel—Easements Act, S. 24—Paramount right of Government to regulate water—Effect of, when inamdar's acts have not materially affected lower villages.

The lands in an inam village *V* are irrigated by an artificial channel *N K* taking off from the Tambaraparni River. After flowing through a number of ayan and inam villages, the channel enters village *V*, flows through it for ¾ths of a mile and then enters a Government village and finally empties itself into certain ayan tanks. It was found that the inamdar of *V* "caused the removal of many stones imbedded in the channel of fairly large dimensions and also got one or two of the pivotal stones . . . cut and removed" for the purpose of making that portion of the channel efficient as a source of irrigation and that "the interference with the bed of the channel had not led to any material diminution in the supply of water to the ayan lands". In an action by the Government to restrain the inamdar from interfering with the channel and for a mandatory injunction directing him to restore the channel to its original condition, the Government rested its claim to relief not on any claim of riparian ownership but on the ground that it was the owner of the bed of the channel even within the limits of the inam village and alternatively on its paramount right to control the channel. The N. K. channel was in existence even before the date of the grant of the village in inam.

Held, that in any view on the findings the suit must fail. The inamdar must be held to have some interest in the bed of the channel at least to the extent required to enable him to maintain it in an efficient condition as a source of irrigation for his lands. Further even if the inamdar's right to take water for irrigating the inam lands is no higher than an easement, he would be entitled under S. 24 of the Easements Act to do in the servient

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* S. A. Nos. 1164 and 1265 of 1931. 30th October, 1936.

tenement (that is, the bed) all acts necessary to secure the full enjoyment of the easement subject to the limitations laid down in that section. In like manner, the Government, by reason of its interest in villages lower down, may be entitled to do certain acts on the bed of the channel within the inam limits, even if this portion of the bed should be held to be the property of the inamdar. Such acts whether done by the inamdar or by the Government cannot be said to amount to a trespass.

If it be assumed that the bed within the inam limits belonged to the inamdar, then the paramount right of the Government to regulate the distribution of water for purposes of irrigation will not give them a right to complain or ask for relief on the above findings.

If the channel has come into existence after the inam grant, the presumption of ownership even in respect of the bed of the channel will be stronger in favour of the inamdar but the Court will then have to find the arrangement under which the channel is likely to have been constructed.

The exact nature and extent of the inamdar's interest in the bed of the channel discussed and left open.

Appeals against the decree of the District Court of Tinnevelly in A.S. No. 65 of 1930 preferred against the decree of the Court of the District Munsiff of Ambasamudram in O.S. No. 167 of 1927.

The Government Pleader (*K. S. Krishnaswami Aiyangar*) for Appellant in S. A. No. 1164 of 1931 and Respondent in S. A. No. 1265 of 1931.

T. L. Venkatarama Aiyar, L. Krishnaswami Aiyar and *R. Sankaran* for 1st Respondent in S.A. No. 1164 of 1931.

T. M. Krishnaswami Aiyar for 2nd Respondent in S. A. No. 1164 of 1931 and Appellant in S. A. No. 1265 of 1931.

The Court delivered the following

JUDGMENT.—These cross-appeals arise out of the same suit and they may be dealt with together. The suit was instituted by the Secretary of State against the Sri Vyasaraya Swami Mutt (2nd defendant) which through its lessee the 1st defendant was in possession of the inam village of Vagaikulam in the Tinnevelly District. The lands in this village are irrigated by an artificial channel known as the "North Kodaimelalagiankal" taking off from the Tambaraparni River. After flowing through a number of ayan villages and inam villages, this channel, at its tenth mile, enters the vagaikulam village and after flowing through that village for three quarters of a mile it enters the Government village of Mannarkoil and finally empties itself into certain ayan tanks. There have been prior litigations between the parties as to the extent of the rights possessed by the Mutt to take water from this

channel. But this litigation is of a somewhat different character.

The plaint alleged that on the 9th and 10th of June, 1926, the 1st defendant deepened the bed of the channel to a depth of one foot three inches to a distance of about 680 feet between the points marked *B* and *C* in the plan, Ex. A. It also alleged that he widened the channel by cutting and removing a number of stones which composed the rocky bed of the channel and served to keep the water-course within narrow limits. The plaintiff complained that as the result of these acts of the 1st defendant, the flow of water into channels taking off from this channel and irrigating ayan lands was greatly retarded and diminished and that a larger volume of water flowed into the branch channel irrigating the defendants' inam lands. The plaint accordingly prayed for a preventive injunction restraining the defendants from interfering with the N. K. channel and for a mandatory injunction directing the defendants to restore the channel bed to the condition in which it was prior to June, 1926, when the defendants made the alterations complained of. The right to relief was based on three grounds, namely, (1) injury to the irrigation of ayan lands, (2) ownership of the channel being in the Government, and (3) the paramount authority of the Government to control the channel from its commencement to its end.

The written statement denied the allegations of fact as well as the propositions of law put forward in the plaint. Six issues were framed in the case, of which it is sufficient to refer to issues 1, 2, 4 and 5. The first issue raised the question of the ownership of that portion of the N. K. channel which lies within the inam limits. The second issue related to the plaintiff's claim of paramount right. The fourth and fifth issues related to the allegations of fact in the plaint as to the deepening and the widening of the channel by the 1st defendant and the consequent interference with the flow of water. The sixth issue was merely consequential, namely, whether the plaintiff was entitled to the injunctions claimed.

Issues 1 to 3 were by agreement of parties not dealt with in the Courts below, because it was expected that they might in substance be decided by this Court in Second Appeal No. 309 of 1928. I do not think it necessary for the purposes of this case to deal with issue 3 and I therefore make no

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further reference to it. On issues 4 and 5 the trial Court found against the plaintiff and consequently dismissed the suit. But on appeal, the learned District Judge while affirming the finding of the trial Court on the fifth issue, came to a different conclusion on the fourth issue. He held that the interference by the 1st defendant with the bed of the channel had not led to any material diminution in the supply of water to the ayan lands and that the interference was not to the extent alleged in the plaint; but he came to the conclusion that the defendants " caused the removal of many stones imbedded in the channel of fairly large dimensions and also got one or two of the pivotal stones ten feet below the point *B* in the plan cut and removed". On these findings he refused to grant the mandatory injunction asked for in the plaint, but granted a permanent injunction " restraining the defendants from interfering in any way with the N. K. channel except for the purpose of clearing the silt and making such annual repairs thereto as are usual and necessary". He added that even these repairs "should be carried out in case where the inamdar has got the right or is under an obligation to do such repairs, only after due and previous intimation to the P. W. Department or officers". The Secretary of State has preferred S. A. No. 1164 to obtain the mandatory injunction as well. The Mutt has preferred S. A. No. 1265 complaining that even the preventive injunction ought not to have been granted.

I see no reason to interfere with the findings of fact of the lower appellate Court that the bed of the channel has been interfered with in the manner and to the extent stated in the passage above extracted but that there has been no material diminution in the supply of water to the ayan lands. The question for determination in the second appeals, is, what relief, if any, is the plaintiff entitled to on these findings.

On behalf of the Mutt, Mr. Krishnaswami Aiyar has contended that as the rights of the Secretary of State to the flow of water in the channel are only in the nature of easement rights, the suit should have been dismissed when once the Court came to the conclusion that the alleged acts of interference by the defendant had not diminished the flow of water to the ayan lands. To clear the ground, I may add that the

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case for the Government has not been based on any claim of riparian ownership; in that case, a question may arise whether the mere interference with the bed of the channel by an upper riparian owner will not justify a claim by the lower owner to have that interference removed, apart from proof of damage resulting therefrom. On behalf of the Government, it has been contended that the Government is the owner of the bed of the channel even within the limits of the inam village and that therefore the acts of interference found by the lower appellate Court constitute trespass, justifying the award both of the preventive injunction and also of the mandatory injunction asked for in the plaint. Alternatively, the claim based upon the paramount right of the Government to control the channel has also been pressed. In reply Mr. Krishnaswami Aiyar has contended that the paramount right relates only to the regulation of the flow of water in the channel by acts done by the Government on their own portion of the channel and would not entitle them to interfere with the bed of the channel within the inam limits or complain of any interference with that portion of the bed by the inamdar. On the question of the ownership of the bed of the channel within the inam limits, he contended that it is the inamdar and not the Government that should be held to be the owner.

I may at this stage mention that the questions which were raised by issues 1 and 2 and which the parties hoped would be decided by the judgment of this Court in S. A. No. 309 of 1928 have not been decided by that judgment, because the learned Judges found it possible to decide that second appeal on their conclusion as to the extent of the easement right possessed by the Mutt. In the ordinary course, it might accordingly have become necessary for me to ask the lower Court to try and decide these issues. But to save time, all the parties agreed before me that I might myself decide these two issues on the evidence on record in this suit as well as in S. A. No. 309 of 1928. The questions raised by the 2 issues have accordingly been argued before me at some length; but the argument has been more on points of law than on matters of evidence, because, barring the entries in the inam register, there is very little evidence bearing upon the question of the ownership of the channel within the inam limits. The original parvana, a copy of which seems to have been produced before the inam authorities, is not now forthcoming nor even that

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copy; it is not therefore possible to gather the exact terms in which the grant was couched. Some reference was made to repairs made by the Government to the N. K. channel; but there is nothing to show that the Government made any repairs to that portion of the channel which lies within the inam limits. I have therefore to decide the question of ownership of the bed of the channel practically as a question of law. I may add that in view of the information gatherable from *Ambalavana Pandara Sannathi* v. *Secretary of State for India*[1], I am proceeding on the assumption that the N. K. channel was in existence even before the date of the inam grant to the Vyasaraya Mutt, because this grant appears to have been made only in 1753 while it is stated in *Ambalavana Pandara Sannathi* v. *Secretary of State for India*[1] that the channel was found to have come into existence even before a grant made in 1614. In cases where a channel like the present is shown to have come into existence *after* the inam grant, the presumption of ownership even in respect of the bed of the channel will be stronger in favour of the inamdar; but the Court will have to draw inferences as to the arrangement under which the channel serving not merely the inam village but other villages above and below is likely to have been constructed.

Dealing with the relief to which the plaintiff was entitled, the learned District Judge observed that *even on the footing that the inamdar was the owner of the N. K. channel within his limits*, the interference with the bed was wholly unwarranted and illegal, independent of any question of its effect in diminishing the supply of water to other tanks or lands and independently of the motives operating on the mind of the defendants, I am not able to concur in this unqualified statement of the law. Rather inconsistently the learned District Judge adds, at the end of the paragraph, that the defendants had no right to interfere with the channel by deepening or widening it or by rendering it narrower or more shallow *so as to increase or lessen the quantity of water flowing through it and thus affect other lands and land-owners.* I propose to deal with the case only on the footing that it has been found that the defendants' acts of interference have not materially or appreciably diminished the supply of water to the lands or tanks of other owners.

1. (1905) 15 M.L.J. 251: I.L.R. 28 Mad. 539.

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I do not see how the paramount right of the Government to regulate the distribution of water for purposes of irrigation will give them a right to complain or ask for relief on the above findings, if it be assumed that the bed within the inam limits belong to the inamdar. In *Robert Fischer* v. *Secretary of State for India*[1] it was recognised that even for the purpose of exercising this right of control, Government cannot commit an act of trespass. It is one thing to say (as observed in the same case on page 160) that the grant to the proprietor 'was subject to the paramount rights of Government to control' the waters of the stream or channel for purposes of irrigation but another thing to say that Government can exercise the same rights on the bed of the stream or channel within the proprietary limits as on the portion of the bed outside those limits. In *Secretary of State for India* v. *Palaniyappa Pillai*[2], Rahim and Srinivasa Aiyangar, JJ., emphasised the limits of the paramount power claimed for the Government, though, in the interests of other lands dependent on the particular system of irrigation, they took care to direct the mittadar to keep the channel and the works connected therewith in proper repair and efficient condition. In *Chinnappan Chetty* v. *Secretary of State for India*[3], Rahim, J., observed that this paramount authority cannot supersede the rights of the riparian proprietors.

If however the Government can maintain that the bed of the channel even within the inam limits is vested in the Government any act of interference with it by the inamdar will amount in law to trespass unless justified by custom or by some implication of a limited grant. This question of ownership of the bed of the channel within the inam limits is not by any means free from difficulty. In the former litigation which culminated in S. A. No. 309 of 1928, the lower Courts assumed that the decisions in *Ambalavana Pandara Sannathi* v. *Secretary of State for India*[4] and *Narayanaswamy Naidu* v. *Secretary of State for India*[5] had in effect been overruled by the Privy Council in *Prasad Row* v. *Secretary of State*

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1. (1908) 19 M.L.J. 131: I.L.R. 32 Mad. 141 at 156.
2. (1917) 22 M.L.T. 345.
3. (1918) 36 M.L.J. 124: I.L.R. 42 Mad. 239 at 254 (F.B.).
4. (1905) 15 M.L.J. 251: I.L.R. 28 Mad. 539.
5. (1912) 24 M.L.J. 36.

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for India[1]. I do not think this is a correct reading of the decision in the *Urlam* case. In all the water cess cases that went up to the Privy Council, their Lordships found it possible to uphold the claim of the proprietor by a decision in his favour as to the extent of water right that he was entitled to, independently of any question as to the ownership of the bed of the stream. The decision in *Secretary of State for India* v. *Subbarayudu*[2] illustrates this. By a liberal interpretation of the reference to 'engagement' in the Irrigation Cess Act, their Lordships were prepared to hold that the immunity from cess extended to the full right of water-supply which the proprietor can claim either by grant or by prescription or as a riparian right. In *Secretary of State for India* v. *Subbarayudu*[2] they explain the decision in the *Urlam* case as one relating to 'easement rights' determined no doubt with reference to the terms of the sanad. In *Secretary of State for India* v. *Maharaja of Bobbili*[3] they preferred to have their decision on an implication of an engagement arising out of a prescriptive easement, though at the end of the judgment they added that they did not intend to differ from the conclusion arrived at by the High Court (see *Secretary of State for India* v. *Maharajah of Bobbili*[4] on the question of the ownership of the bed of the river). The observations in *Secretary of State for India* v. *Subbarayudu*[2] establish that the ownership of the stream referred to in the Irrigation Cess Act is the ownership of the bed and not of the volume of the water as an independent entity.

The decisions in *Secretary of State for India* v. *Palaniyappa Pillai*[5] and *Secretary of State for India* v. *Maharaja of Bobbili*[4] and of the Full Bench in *Chinnappan Chetti* v. *Secretary of State*[6] are no doubt authorities for the proposition that in the case of Zemindaris, the bed even of natural streams, so far as they lie within the Zamindari limits, would *prima facie* belong to the proprietor. This view may also be said to be supported by the observations of the Judicial Committee in *Prasad Row*

1. (1917) 33 M.L.J. 144: L.R. 44 I.A. 166 : I.L.R. 40 Mad. 886 at 900, 903 and 904 (P.C.).
2. (1931) 62 M.L.J. 213: L.R. 59 I.A. 56: I.L.R. 55 Mad. 268 at 280 (P.C.).
3. (1919) 37 M.L.J. 724: L.R. 46 I.A. 302: I.L.R. 43 Mad. 529 (P.C.).
4. (1915) 30 M.L.J. 163.
5. (1917) 22 M.L.T. 345.
6. (1918) 36 M.L.J. 124: I.L.R. 42 Mad. 239 (F.B.).

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v. *Secretary of State for India*[1]. The question is, whether the same conclusion holds good in the case of inams. Government have been contending that even in respect of water rights, the *Urlam* decision should not be applied to inamdars; but even if this contention should be held to be untenable, it would not necessarily follow that the question of ownership of the bed should be decided alike in both cases, for the decision in *Secretary of State for India* v. *Subbarayudu*[2] shows that the question of water rights may be dissociated from that relating to the ownership of the bed.

In *Ambalavana Pandara Sannathi* v. *Secretary of State for India*[3] and *Narayanaswamy Naidu* v. *Secretary of State for India*[4] weighty reasons have been suggested in favour of the view that where a main channel, is the source of irrigation not merely for an inam village but for other Ayan villages also, it must be presumed that the channel was not intended to be comprised in the gift to the inamdar. The *Ambalavana Pandara Sannathi* v. *Secretary of State for India* case related to the very channel now in question. In *Venkatarama Sivan* v. *Secretary of State for India*[5] Sadasiva Aiyar, J., expressed the opinion that the decision in the *Urlam* case overruled the view expressed in these cases in respect of river porambokes and channel porambokes in whole inam villages. I am, with all respect, unable to concur in that opinion. That considerations of the kind referred to in these decisions are not irrelevant to the question is shown by the observations of the Judicial Committee in *Prasad Row* v. *Secretary of State for India*[1]. In *Secretary of State for India* v. *Kannepalli Venkataratnammah*[6] Benson and Sundara Aiyar, JJ., treated the question of the inamdar's ownership of the bed of the channel as one depending on the circumstances of each case and laid stress on the fact that the stream concerned in the case before them was not part of any larger irrigation system maintained by the Government. In *Narayanaswamy Naidu* v. *Secretary of State for India*[4] Sankaran Nair, J., reserved his opinion on this point and in *Secretary of State* v. *Ambalavana Pandara*

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1. (1917) 33 M.L.J. 144: L.R. 44 I.A. 166: I.L.R. 40 Mad. 886 at 900, 903 and 904 (P.C.).
2. (1931) 62 M.L.J. 213; L.R. 59 I.A. 56: I.L.R. 55 Mad. 268 at 280 (P.C.).
3. (1905) 15 M.L.J. 251: I.L.R. 28 Mad. 539.
4. (1912) 24 M.L.J. 36.
5. (1918) 36 M.L.J. 203 at 207.
6. (1912) 23 M.L.J. 109: I.L.R. 37 Mad. 364 N.

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Sannadhi[1] he expressed his conclusion as a finding on the facts of that case and not as one based on any general principle. In *Venkata Lakshmi Narasamma* v. *Secretary of State*[2] reference was made to a Full Bench, in connection with an inam grant, of the question whether the English rule of construction that a grant carries the bed of an adjoining river *ad medium filum* is applicable in India; the Full Bench gave a guarded answer to the effect that the presumption applied, but it may be strong or weak according to the circumstances. It was however added that the onus of showing that the grant did not convey the bed was on the grantor. Whether the considerations adverted to in *Ambalavana Pandara Sannathi* v. *Secretary of State for India*[3] and *Narayanaswamy Naidu* v. *Secretary of State for India*[4] would suffice to rebut the presumption remains an open question.

The decision in *Secretary of State for India* v. *Srinivasachariar*[5] has introduced a further difficulty. The presumption of *ad medium filum* ownership of the bed has to be based on the ownership of the banks and the adjoining lands; but in *Secretary of State for India* v. *Srinivasachariar*[5] the Judicial Committee has recognised only a qualified kind of ownership in the inamdar, even in respect of the lands comprised in the inam, except when the terms of the grant expressly create a larger right. Assuming it is a grant of the land and not merely of the revenue, they say, 'it was not a complete transfer of all that was in the grantor—but merely something carved out of his larger interest'. In their view, the only benefit contemplated or intended for the grantee would ordinarily be the 'use of the land for the purposes of cultivation'. In *Venkata Krishnama Raju* v. *Suryanarayana Raju*[6] the learned Judges were prepared to treat even this kind of interest as 'ownership' for certain purposes. It may be open to question whether the presumption of *ad medium filum* ownership of the bed of a river or channel skirting or flowing through an inam village could be based on this kind of ownership of the adjoining lands. In *Ambalavana Pandara Sannathi* v. *Secretary of State for India*[3] the terms of the sanad relating to the grant of a

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1. (1914) I.L.R. 37 Mad. 369 at 370 and 371 N.
2. (1918) 35 M.L.J. 159: I.L.R. 41 Mad. 840 (F.B.).
3. (1905) 15 M.L.J. 251: I.L.R. 28 Mad. 539.
4. (1912) 24 M.L.J. 36.
5. (1920) 40 M.L.J. 262: L.R. 48 I.A. 56: I.L.R. 44 Mad. 421 (P.C.).
6. (1933) 67 M.L.J. 544: I.L.R. 57 Mad. 460.

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neighbouring village irrigated by the same channel are set out and they are such as may amount to a grant of full ownership even according to the test indicated in *Secretary of State for India* v. *Srinivasachariar*[1]. As already stated, the original Parvana or even a copy of it is not available in the present case.

In the above state of the authorities, I should have preferred to place the case before a Bench (or even a Full Bench) if I thought that for the disposal of these second appeals, it was necessary to come to a positive conclusion as to the nature and extent of the inamdar's interest in the bed of the channel. But it seems to me that this case can be disposed of on narrower grounds. Even on the principle stated in *Ambalavana Pandara Sannathi* v. *Secretary of State for India*[2] and the qualified ownership recognised in *Secretary of State for India* v. *Srinivasachariar*[1] the inamdar must, it seems to me, be held to have *some interest* in the bed of the channel, to the extent required to enable him to maintain it in an efficient condition as a source of irrigation for his lands. Further, even if his right to take water for irrigating the inam lands be put no higher than an easement, he would be entitled under S. 24 of the Easements Act to do on the servient tenement (that is, the bed) all acts necessary to secure the full enjoyment of the easement, subject of course to the limitations indicated in that section. In like manner, the Government, by reason of its interest in villages lower down, may be entitled to do certain acts on the bed of the channel within the inam limits, even if this portion of the bed should be held to be the property of the inamdar. Such acts whether done by the inamdar or by the Government cannot be said to amount to a *trespass*. On the findings, I cannot hold that what the inamdar has done in the present case was done for any other purpose than to make that portion of the channel efficient as a source of irrigation. It is in this view that I am unable to concur in the opinion of the learned District Judge that the motive or purpose of the inamdar in doing these acts is immaterial. The removal of the stones cannot by itself be said to be 'damage' to the servient heritage. The gravamen of the plaintiff's complaint was that the defendant's acts interfered with the supply of

1. (1920) 40 M.L.J. 262: L.R. 48 I.A. 56: I.L.R. 44 Mad. 421 (P.C.).
2. (1905) 15 M.L.J. 251: I.L.R. 28 Mad. 539.

water to the ayan villages or at least increased the supply to the inam lands. But this allegation has been found against by both the Courts. It seems to me unjustifiable to impose on the inamdar the duty of giving notice to the plaintiff's officers before the inamdar could do what he is legally entitled to do, namely, to clear silt or effect repairs to the channel within his limits. The result is that S. A. No. 1164 is dismissed, S. A. No. 1265 is allowed and the suit dismissed with costs throughout, of the second defendant. Time for payment of costs, 3 months.

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Before taking leave of the case, I must express my dissent from the way the learned District Judge has criticised the District Munsif's treatment of the part played by P.W. 6 in this litigation. I quite agree that in the decision of the merits of the case, such considerations have no place; but they are relevant to the question of the award of costs. More than that, I would emphasise that in the matter of starting a litigation of this kind, the Government should in my opinion not regard itself as standing in the same position as a private litigant. In the public interests, it should insist that its officers should take upon themselves a due share of responsibility in satisfying themselves that the allegations on which the suit is sought to be founded are reasonably true and not be led away by emphatic assertions made by private parties or even by their offer of indemnity as to costs.

Leave granted.

S. V. V. *S.A. No. 1164 dismissed.*

S.A. No. 1265 allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE CORNISH.

T. Rajagopala Aiyangar .. *Appellant**

v.

The Collector of Salt Revenue (Out Ports) Madras .. *Respondent.*

Rajagopala Aiyangar *v.* Collector of Salt Revenue, Madras.

Civil Service Rules (Classification, Control and Appeal), Rr. 49 and 55—Government of India Act (1919), S. 96-B—Collector of Customs making inquiry on charges being framed against another officer subordinate to Central Board of Revenue—Whether the officer has a right to be heard only by the

* O. S. Appeal No. 19 of 1937. 6th April, 1937.

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authority that has the right of imposing penalty—Right to be represented by an advocate whether available to the officer.

Two officers of Salt and Customs were charged with certain misconduct and an enquiry under r. 55 of the Civil Services (Classification, Control and Appeal) Rules was conducted by the Collector of Salt Revenue, Madras, deputed by the Central Board of Revenue for that purpose. The applicants sought to restrain the Collector by a writ of prohibition from proceeding with the inquiry on the grounds that (*a*) the body which has authority to remove, dismiss or reduce the applicant was the Central Board of Revenue and the enquiry should be held by them and not by the Collector of Customs and (*b*) the applicants were entitled to be represented at the enquiry by an advocate and this having been denied to them the enquiry was not in conformity with the provisions of the law.

Held, (1) that there was no illegality in the procedure adopted as there is no statutory provision to the effect that it is the right of any person to defend himself before the authority dismissing him (in this case the Central Board at Delhi) and of placing his evidence before that body, and none of the authorities lays it down that in the absence of an express power of delegation the inquiry must be held by the authority imposing the penalty; and as regards words of r. 55, the authority concerned will be the Central Board of Revenue and that the authority can direct an oral enquiry to be held and if the rule contemplated that only the authority concerned should hold the inquiry the wording of the rule would be different.

Chandi Charan Dey, In re, (1908) 12 C.W.N. 842 and In the matter of *Southekal Krishna Rao*, (1887) L.R. 14 I.A. 154: I.L.R. 15 Cal. 152 (P.C.), distinguished.

(2) that the right given by r. 55 to be heard 'in person' is restricted to the person of the Government servant and hence he had no right to be represented by Counsel.

The Queen v. *Mansel Jones*, (1889) 23 Q.B.D. 29, relied on.

Per *Chief Justice*.—If there is any hardship caused to the applicant by his being deprived of the assistance of a Counsel, the construction of a statute is not to be governed by any such consideration.

On appeal from the judgment and order of the Hon'ble Mr. Justice Gentle dated the 26th day of February, 1937, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 349 of 1937.

K. S. Jayarama Aiyar, K. Venkataraghavachari and *V. K. Parthasarathy Aiyangar* for Appellant.

The Advocate-General (Sir A. Krishnaswamy Iyer) instructed by *The Government Solicitor* for Respondent.

The Court delivered the following

Beasley, C.J.

JUDGMENTS. *The Chief Justice*.—This appeal is from an order passed by Gentle, J., on two applications under S. 45 of the Specific Relief Act praying for an order restraining the Collector of Salt Revenue, Madras, by a writ of prohibition from conducting or holding or proceeding with an enquiry

into the conduct of the two applicants. The appellant was the applicant in No. 349 of 1937. The order passed by Gentle, J., covered the contentions of both of the applicants which were identical. An interim injunction had been granted on the 8th February. Gentle, J., by his order dissolved that injunction, discharged the rule *nisi* and dismissed the applications.

The appellant is an Assistant Commissioner of Salt and Customs, Central Division, Madras, to which office he was appointed on the 16th March, 1936, before which date he was Inspector of Salt and Customs, Negapatam. Certain charges had been made against the appellant and an enquiry under r. 55 of the Civil Services (Classification, Control and Appeal) Rules was proceeding on the date of the applications, the enquiry being conducted by the Collector of Salt Revenue, Madras, Mr. H. Greenfield. Previously, on the 5th November, 1936, Mr. Greenfield ordered the suspension of the appellant pending investigation of his conduct, and that of the other applicant before Gentle, J., whilst in charge of Karaikal frontier, Negapatam Circle. The applicant, as already stated, sought to restrain the Collector by writ of prohibition from proceeding with the enquiry. The applicants alleged that the enquiry was irregular and contrary to law in the following respect, namely, (*a*) the body which has authority to remove, dismiss or reduce the applicants was the Central Board of Revenue and the enquiry should be held by them and not by the Collector of Customs; (*b*) the applicants are entitled to be represented at the enquiry by an advocate and this having been denied to them the enquiry is not in conformity with the provisions of the law; and (*c*) they have not had communicated to them in respect of the charges made against them a statement of the allegations on which each charge was based. In the appeal, ground (*c*) was not pressed by the appellant.

I do not propose to set out in this judgment in detail all the facts or all the relevant rules of the Civil Services (Classification, Control and Appeal) Rules because they have been fully set out in the judgment of the learned trial Judge; I will only refer to those which are absolutely necessary for the disposal of the questions before us.

With regard to ground (*a*) S. 96-B (1) of the Government of India Act says that no person in the service of the Crown in India may be dismissed by any authority subordinate

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to that by which he was appointed; and it is common ground that the appellant was appointed by the Central Board of Revenue. Therefore he can only be dismissed by that authority and not by the Collector of Customs and the Central Board of Revenue cannot delegate that power to the Collector of Customs. The Central Board of Revenue has by delegation by the Governor-General in Council the power to impose the penalties contained in r. 49 of the Civil Services (Classification, Control and Appeal) Rules. They are seven in number including dismissal and only two of them, namely, (*i*) and (*v*) —censure and suspension—may be imposed by the Collector of Customs. It follows, therefore, that if charges of a sufficiently grave nature as to justify dismissal are proved, only the Central Board of Revenue has the power to order it and this is the foundation for the argument in support of point (*a*) which is that it is only the authority having the power to dismiss the servant that can hold the enquiry under r. 55 and upon this point we have had addressed to us a very careful and learned argument by Mr. Jayarama Aiyar. The learned trial Judge has to a large extent based his view upon the words of r. 55, and it is that the rule contemplates an enquiry by some other authority than the Central Board of Revenue (the authority having the power of dismissal, removal or reduction). By r. 55 of the Civil Services (Classification, Control and Appeal) Rules the member of the service is to be given an adequate opportunity of defending himself and the grounds on which it is proposed to take action are to be reduced to the form of a definite charge or charges which must be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. The person charged is required within a reasonable time to put in a written statement of his defence and to state whether he desires to be heard in person. Here follow some words which the learned trial Judge considers have a very material bearing upon the question, namely:—

> " If he so desires or if the authority concerned so direct, an oral enquiry shall be held".

Gentle, J., considers "the authority concerned" to be the Central Board of Revenue and lays emphasis upon the fact that this authority can "direct" an oral enquiry to be held and is of the opinion that if the rule contemplated that only the

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authority concerned should hold the enquiry the wording of the rule would be different and it would have read "an oral enquiry shall be held by them" or "by the authority concerned". In my opinion, the words "direct an oral enquiry" indicate that it is someone else that is to hold the enquiry although of course it may be argued not unreasonably that an authority may issue a direction that something is to be done and itself do it. For instance, a Court may direct an examination of certain witnesses and may and frequently does conduct such examination. But in my view the words indicate the former rather than the latter intention. They mean, I think, that the Central Board of Revenue may, even in ca es where the person charged may not desire an oral enquiry, nevertheless direct that there shall be one. Further light is thrown upon the meaning of the rule by the words which follow later:

"Provided that the officer conducting the enquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness".

Gentle, J., considers that this indicates that the enquiry is to be held by some person other than the authority concerned. I agree and think that had the latter body been in contemplation the words "authority concerned" would have appeared instead of "the officer". Mr. K. S. Jayarama Aiyar has argued strenuously to the contrary on the ground that it is fundamentally wrong that any person should defend himself with his witnesses before one tribunal and be dismissed by another body of authority which has not had the advantage of hearing the witnesses or observing their demeanour that when so grave a penalty as dismissal is involved, the dismissing authority should not exercise its powers merely on an examination of the record before them and the report of the officer conducting the enquiry, and he also contends that the words of r. 55 are not either expressly or by implication clear enough to support the learned trial Judge's view and that if there is any ambiguity in the words, the benefit should be given rather to the person charged than to the respondent. On the first point it seems to me that there is nothing repugnant to a sense of justice in the procedure objected to by Mr. Jayarama Aiyar. If the Collector with or without an enquiry imposes the penalties which he is empowered to inflict, for example, suspension or censure, the servant has a right of appeal against such order to the Central Board. If there is an enquiry by him the Board will have the

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necessary information before them to exercise such powers as are vested in them regarding penalties. They will have the finding upon the evidence of the officer who conducted the enquiry and from any order which they may pass the person charged has a right of appeal to the Governor-General-in-Council, and Indian Legislation has recognised that there is no injustice in the procedure so strongly criticised by Mr. Jayarama Aiyar and to give one instance of a statute which empowers one tribunal to conduct the enquiry and another to inflict the penalties we have the Indian Bar Councils Act (S. 10) and others were cited but Mr. Jayaram Aiyar refers to *Chandi Charan Dey*, In re[1]. There it was held that before proceeding to declare a person to be a tout, the District Magistrate should himself make an enquiry as to the person's antecedents and give him an opportunity to show cause. There a Sub-Divisional Officer called on a person to show cause why he should not be declared a tout and he showed cause and the Sub-Divisional Officer after recording evidence on both sides submitted the proceedings with his report to the District Magistrate and the latter after perusing them passed orders declaring the person to be a tout and it was held that the order should be set aside. It must be observed however that that case was a decision on S. 36 of the Legal Practitioners Act as it then read, but by Act XV of 1926 the words "or to the satisfaction of any subordinate Court" were added to the words as they stood before the amendment, that is:

> " Every High Court, District Judge, Sessions Judge, District Magistrate and Presidency Magistrate, every Revenue Officer, not being below the rank of a Collector of a District and the Chief Judge of every Presidency Small Cause Court (each as regards their or his own Court and the Courts if any subordinate thereto) may frame and publish lists of persons proved to their or his satisfaction".

These are important words because at that date the case had to be proved to the satisfaction of the Court publishing the list of touts. Whereas by reason of the amendment referred to a Court subordinate to the Court inflicting the penalty is empowered to find on the question of proof. In the matter of *Southekal Krishna Rao*[2] was also cited by Mr. Jayarama Aiyar. There a charge of unprofessional conduct brought against a practitioner holding a certificate under Act XVIII of 1879 having been found to be established by a

1. (1908) 12 C.W.N. 842.
2. (1887) L.R. 14 I.A. 154: I.L.R. 15 Cal. 152 (P.C.).

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subordinate Court which also considered that he in consequence should be dismissed and the same having been reported in conformity with S. 14 of that Act to the principal Court in the province such dismissal was ordered and it was held however that the practitioner could not be dismissed or suspended under that section without his having been allowed under S. 40 an opportunity of defending himself before that Court. What happened there was that the practitioner was fully heard by the Commissioner of Coorg and adduced his evidence which was also heard and their Lordships expressed the opinion that:

"The petitioner had the opportunity of adducing such evidence as he might think fit and that his complaint on that head is not well founded. But upon the evidence so obtained being remitted to the Judicial Commissioner, he makes this report or order: 'I have gone very carefully again through all the papers connected with this case, and I have given them my best consideration. I regret that I am unable to modify the opinion expressed in my previous order or to alter the conclusion arrived at'."

He, therefore, concludes:

"I confirm my former order striking petitioner off the rolls. This order was made without the petitioners having had the opportunity of being heard before the Acting Judicial Commissioner after the evidence had been taken and in that respect their Lordships are of opinion that there has been a plain irregularity".

This case with all respect to Mr. Jayarama Aiyar's argument is not at all helpful on this point. It is quite clear that one tribunal heard the evidence and that the higher tribunal on that evidence inflicted the penalty which is the very procedure objected to by Mr. Jayarama Aiyar. Their Lordships do not criticise that procedure in the least. What they do say is that after the evidence had been taken the practitioner was not given an opportunity of being heard by the higher tribunal and they refer to the words of S. 40 of the Act which reads as follows:—

"Notwithstanding anything hereinbefore contained no pleader shall be suspended or dismissed under this Act unless he has been allowed an opportunity of defending himself before the authorities *suspending or dismissing him*".

That makes the position quite plain. R. 55 however says that:

"No order of dismissal, removal or reduction shall be passed on a member of a service . . . . unless . . . he has been afforded an adequate opportunity of defending himself".

And the words "before the authority suspending or dismissing him" are significantly absent. Mr. Jayarama Aiyar has also referred to the Public Servants (Inquiries) Act

(XXXVII of 1850). It is conceded of course by him that Act does not apply to the present case. He relies upon that Act however in support of his argument that unless there is an express power to delegate to some other body or person the holding of an enquiry into the conduct of a person or persons such as there is in S. 3 of that Act then it is the right of every person to defend himself before the authority dismissing him and of placing his evidence before that body. There is however no statutory provision to that effect and in none of the authorities cited by him is it laid down that in the absence of an express power of delegation the enquiry must be held by the authority imposing the penalty and as regards the words of r. 55 I think that the learned trial Judge's view is correct. I should also add, although this is not a guiding test, that it has not been the practice for such enquiries to be conducted by the Central Board of Revenue which is in Delhi and the inconvenience of enquiry by such an authority is manifest. In the present case, a member or members of the Board—and we are told that there are only two—would either have to come to Madras in order to hold the enquiry or the appellant would have to go to Delhi with all his witnesses.

With regard to point (*b*), namely, the right of the appellant to be represented by counsel Mr. Jayarama Aiyar relies upon S. 14 (1) of the Bar Councils Act which reads as follows:—

> " An advocate shall be entitled as of right to practice
>
> (*b*) save as otherwise provided by sub-S. (2) or by or under any other law for the time being in force, in any other Court in British India and before any other tribunal or person legally authorised to take evidence".

Under r. 55 the person holding the enquiry is legally authorised to take evidence and hence he argues that an advocate is entitled as of right to appear at such an enquiry. But, the Advocate-General argues that the real question is not whether an advocate has a right to appear but whether his client has a right to be represented by him, that is to say, is the enquiry one at which the person charged is entitled to appear at all, or to appear in person only, or by himself or by his agent. Mr. Jayarama Aiyar has conceded that there is no right at Common law to appear by an agent and the Advocate-General argues that there is no such general right and that the scheme of the Indian Legislature is to confer only a special right to be represented by an advocate or agent such as that

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given by S. 340 of the Criminal Procedure Code. Such a statutory right is also given under O. 3, r. 1, Civil Procedure Code. Also O. 33, r. 3 enables a person to present an application through an authorised agent if he is exempted from appearing in Court. S. 31 of the Native Converts Marriage Dissolution Act entitled a person to appear by his advocate in cases under that Act. S. 76 of the Patents and Designs Act is another instance in point. So also one S. 30 of the Railways Act of 1890, S. 14 of the Trade Disputes Act and S. 24 of the Workmen's Compensation Act. There is very little authority in the shape of decision but the Advocate-General cites a case where the Court denied the right of a person to appear except by himself, namely, In re *Prince Blucher*: Ex parte *Debtor*[1]. By S. 16, sub-S. 1 of the Bankruptcy Act, 1914, where a debtor intends to make a proposal for a scheme of composition in satisfaction of his debts he shall within the time thereby limited lodge with the Official Receiver a proposal in writing signed by him, etc. In that case the debtor was unable through serious illness to sign the proposal which was signed on his behalf by his solicitors and nevertheless it was held that the words "signed by him" were explicit and consequently no proposal for a composition had been lodged within S. 16, sub-S. 1 of the Act. He distinguishes the case of *The Queen* v. *Assessment Committee of St. Mary Abbotts, Kensington*,[2] cited in the trial Court on the ground that there the statute, namely, the Union Assessment Committee Act of 1862 provides that the assessment committee ought to hear and determine the objections of any person aggrieved by a valuation list, not that they are to hear the objections only. Lord Esher, M.R., on page 382 speaking of the assessment committee says:—

> "The question here is whether, being such as they are, they have a right to say that a person may not appoint any agent he pleases to appear in support of an objection made by him to the list. There is, in my opinion, nothing in law which authorises them to limit, as they have done, the rights of persons to whom the legislature has given the right of making objection to the list. I think such persons have a right to appear themselves or by any agent authorised by them".

Another case referred to by the Advocate-General is *The Queen* v. *Mansel Jones*[3]. The decision there turned upon the

1. (1931) 2 Ch. D. 70.
2. (1891) 1 Q.B.D. 378.
3. (1889) 23 Q.B.D. 29.

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words of the statute, namely, S. 38 of the Corrupt and Illegal Practices Prevention Act, 1883. There, before a person not being a party to an election petition nor a candidate on behalf of whom the seat is claimed is reported by an election Court to have been guilty of any corrupt or illegal practice, the Court shall cause notice to be given to him if he appears:

"Shall give him an opportunity of being heard by himself, and of calling evidence in his defence to show why he should not be so reported".

It was held that this section excluded the person's right to be heard by his counsel or solicitor. On page 32 Lord Coleridge, C.J., says:—

"As I have often said in this Court, I prefer that mode of construing a statute by which you look at the words used, and, if they are plain, give effect to them, to the mode of construction by which you first satisfy yourself what Parliament ought to have meant and then interpret the statute by saying that it has so said. Here the Act has said as plainly as possible that the person shall be heard "by himself". I am of opinion that those words exclude him from being heard either by counsel or solicitor".

There being no common-law right to be represented by counsel, and if there are statutes directing how a person is to be heard as in the case referred to, then the words of the statute alone afford a solution of the question. Are there any words in r. 55 which sufficiently clearly show how the person charged may appear at the enquiry? The rule provides that the person charged shall be required within a reasonable time to put in a written statement of his defence and to state whether he desires to be heard *in person* and that he is entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish. In my view, the words "to be heard in person' must be given their natural and ordinary meaning; and the other provisions already referred to appear to me to be consistent with an appearance in person and not by agent or counsel and, adopting the method of construing a statute preferred by Lord Coleridge, C.J., in *The Queen* v. *Mansel Jones*[1]. I look at the words used which appear to me to be sufficiently plain to give effect to them. That being so, in my view, they exclude the appellant from being heard by counsel or otherwise than in person. I agree with the Advocate-General's contention and the view of the learned trial Judge that this question has to be determined not by counsel's right of audience in inferior Courts but by

1. (1889) 23 Q.B.D. 29.

the right of the client to be represented by him, and any argument based on S. 14 (1) (*b*) of the Bar Councils Act therefore does not assist the appellant. If there is any hardship caused to the appellant by his being deprived of the assistance of counsel, though I do not think that there is in the present case, the construction of a statute is not to be governed by any such consideration. In my view, the appeal fails and must be dismissed. No costs.

Cornish, J.—I am of the same opinion. R. 55 of the Civil Services Rules provides for the case of a departmental inquiry into charges against a Government servant, who is subject to the rule, independently of the formal and public inquiry which might be held under the Public Servants Inquiry Act. The rule contains a safeguard. None of the graver penalties—dismissal, removal or reduction—which the Central Board of Revenue in this instance is alone empowered to inflict, can be imposed upon the person charged unless he has been given an adequate opportunity of defending himself. He may be content to put in a written statement by way of defence to the charges; or, if he so desires or if the authority concerned, which must mean the Central Board, so directs, there is to be an oral inquiry at which evidence can be called and witnesses examined and cross-examined. But the rule does not state that the Central Board shall conduct the inquiry. Neither is there to be found in the rule any provision, similar to that contained in S. 36 (1) of the Legal Practitioners' Act, from which it is to be implied that the Board must itself have held the inquiry to enable it to inflict one of the penalties referred to. On the contrary, the allusion in the rule to "the officer conducting the inquiry" denotes that the Board is competent to depute some subordinate officer, such as the present respondent, the Collector of Salt Revenue, to hold the inquiry. In short, the purpose of the rule is to enable a Government servant to defend himself when his conduct is the subject of a charge which is to be departmentally investigated. And so long as the conditions of the rule are followed there seems to be nothing prejudicial to the Government servant in the circumstance that the inquiry is held not by the Board itself, or by one of its members, but by some subordinate officer deputed by the Board for the purpose. The officer conducting the inquiry is required by the rule to record the evidence and to state his findings and grounds thereof. The Board has, there-

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fore, all the necessary material before it to come to a decision regarding the penalty to be imposed if it is satisfied that the charge against the Government servant is established though the Board is not bound to accept the findings of the officer who conducted the inquiry.

With regard to the only other subject of this appeal I agree that the Government servant in an inquiry under r. 55 has no right to appear by counsel, and, having no such right, no case for mandamus to the respondent to admit the appellant to have the assistance of counsel at the inquiry has been made out. There is in British India no common law right in a party to a proceeding to be represented by counsel. The right, wherever it exists, will be found to be given by enactment. The Advocate's right of audience since the Bar Councils Act depends on S. 14 of the Act. This right, "save as otherwise provided by any other law for the time being in force," includes the right of audience before any tribunal or person legally authorised to take evidence. The officer conducting an inquiry under r. 55 is clearly a person legally authorised to take evidence. The statutory rule confers on him this authority. But the advocate's right of audience is necessarily inseparable from his client's right to appear by advocate before a particular tribunal. If the client is expressly denied the privilege of being heard by counsel, it is obvious that the Bar Councils Act will not save him from the disability. R. 55 limits the Government servants' right to be heard 'in person'. In *The Queen* v. *Mansel Jones*[1] it was held that a right given by statute to a person to be heard "by himself" meant that he had no right to be heard by anybody but himself; and I think that the right given by r. 55 to be heard "in person" is similarly restricted to the person of the Government servant. It may be that there is no apparent reason in justice or expediency why a Government servant, who has undoubtedly the right to appear by counsel in an inquiry into his conduct under the Public Servants Inquiry Act, should be deprived of this privilege in an inquiry under r. 55 when the consequences may be equally serious to him. But this is a consideration which cannot be allowed to affect the plain language of the rule.

1. (1889) 23 Q.B.D. 29.

R. 49 of the Civil Service Rules is as follows:—

The following penalties may, for good and sufficient reason, and as hereinafter provided, be imposed upon members of the services comprised in any of the clauses (1) to (5) specified in rule 14, namely:—

(i) Censure.

(ii) Withholding of increments or promotion, including stoppage at an efficiency bar.

(iii) Reduction to a lower post or time-scale, or to a lower stage in a time-scale.

(iv) Recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of orders.

(v) Suspension.

(vi) Removal from the civil service of the Crown, which does not disqualify from future employment.

(vii) Dismissal from the civil service of the Crown, which ordinarily disqualifies from future employment.

Explanation.—The discharge—

(*a*) of a person appointed on probation, during the period of probation,

(*b*) of a person appointed otherwise than under contract to hold a temporary appointment, on the expiration of the period of the appointment,

(*c*) of a person engaged under contract, in accordance with the terms of his contract,

does not amount to removal or dismissal within the meaning of this rule.

R. 55 of the Civil Service Rules is as follows:—

Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of dismissal, removal or reduction shall be passed on a member of a service (other than an order based on facts which have led to his conviction in a criminal Court) unless he has been informed in writing of the grounds on which it has been proposed to take action, and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action, shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged to-gether with the statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires or if the authority concerned so direct, an oral inquiry shall be held. At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross examine the witnesses, to give evidence *in person* and to have such witnesses called, as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof.

This rule shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule may, in exceptional cases, for special and sufficient reasons to be recorded in writing, be waived, where there is a difficulty in observing exactly the requirements of the rule and those requirements can be waived without injustice to the person charged.

(*See* supra.)

K. C. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD THANKERTON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Babu Kedarnath Goenka .. *Appellant**

v.

Maharaj Kumar Babu Bageshwari Prasad Singh and others .. *Respondents.*

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Babu Kedarnath Goenka *v.* Babu Bageshwari Prasad Singh.

Mesne profits—Co-sharers—Recovery of possession of land—Arrear of Land Revenue—Compulsory sale of share in village—Possession of whole village obtained by purchaser—Restitution—Purchaser whether liable for mesne profits in respect of whole village or only of vendor's share—Interest on mesne profits.

A large area of a certain revenue-paying estate consisted of an *ijmali* or joint share in three villages, all the proprietors of the holding being jointly liable for the payment of land revenue. In 1901 there was an arrear of land revenue payable in respect of the *ijmali* share, and the Revenue Collector, in exercise of his statutory powers, sold the *ijmali* share by auction to the appellant-purchaser. Proceedings by the other joint owners of the share for the annulment of that sale were successful in 1915, and they obtained a decree granting them possession of the land with mesne profits and interest. Meanwhile, in 1908, certain pending proceedings for partition were concluded, as a result of which the respondent joint owners were awarded shares in each of three *ijmali* villages, *S.*, *P.* and *D.* The appellant-purchaser had become entitled to a fractional share in each of the three villages, but in fact he obtained possession of the whole of *S.* and of no part of either *P.* or *D.*, which remained in the exclusive occupation of the respondents. In 1915, the appellant was by order entered in the Collector's register as owner in respect of a fraction represented by the 6 odd annas in each of the three villages. In 1918 the respondents recovered possession of the property as a result of the decree obtained in 1915, and then took out proceedings in execution for the recovery of mesne profits with interest.

Held that, although the interest in *S.* purchased by the appellant was on partition represented by only a share, as he in fact came into possession of the whole of the village of *S.* after the partition, he was liable to account for the entire mesne profits of *S.* village from the completion of the partition in 1908 until the date of the entry in the Collector's register in 1915.

Held, further, that in the absence of special circumstances, 6 per cent. was a fair rate of interest to be awarded on the mesne profits payable to the respondents and there was no justification for awarding interest at a higher rate down to the date of the delivery of possession of the property.

Secretary of State for India in Council v. *Saroj Kumar Acharjya Choudhury,* (1934) 68 M.L.J. 580: L.R. 62 I.A. 53: I.L.R. 62 Cal. 499 (P.C.), relied on.

Consolidated appeals from two decrees of the High Court of Judicature, Patna (Kulwant Sahay and Scroope, JJ.).

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* P. C. Appeal No. 10 of 1935. 12th March, 1937.
Patna Appeals Nos. 21 and 22 of 1932.

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dated 13th August, 1931, and modifying a decree of the Subordinate Judge of Monghyr dated 16th November, 1927.

A. M. Dunne, K.C., and *S. P. Khambatta* for Appellant.—The method adopted by the Courts below for ascertaining the amount of the mesne profits is wrong in law. As purchaser the appellant was entitled only to the share in *S.* represented by 6 annas, 9 gandas and 14 cowries; accordingly, anything which he realised over and above that fractional share he can only have realised as a trespasser. He might be found liable for the excess of profits in an action appropriate to that matter, but he cannot be so found in execution proceedings.

With regard to the interest which the High Court has awarded, *Secretary of State for India in Council* v. *Saroj Kumar Acharjya Choudhury*[1] is an authority for the proposition that interest at the Court rate of 6 per cent. only should be allowed throughout the period in question.

J. M. Parikh for Respondents.—The appellant having been in possession of the whole of *S.* he is liable for the period in question for the whole of the mesne profits of that village. With regard to interest, the ordinary rate is 12 per cent. and the Courts below had a discretion as to whether they would allow it or not. There is no valid reason here for interfering with the discretion which the Courts exercised.

12th March, 1937. The judgment of the Board was delivered by

Sir Shadi Lal.

Sir Shadi Lal.—These consolidated appeals arise out of proceedings in the execution of a decree obtained against the appellant by the respondents for the possession of land and for the mesne profits thereof. The questions raised by the appeals relate to the assessment of the mesne profits, and to the rate of interest which should be allowed on the profits.

The circumstances which led to the decree sought to be executed may be shortly stated. In the Monghyr district of the Province of Bihar there was an estate called Mahal Bisthazari. The mahal comprised about 360 villages, but was entered in the Collector's register as a separate revenue-paying estate. There were numerous proprietors in the mahal owning specific shares, some in one village only, others in several villages. Ordinarily, all the proprietors in a revenue-paying estate are jointly liable for the payment of the land revenue

1. (1934) 68 M.L.J. 580: L.R. 62 I.A. 53 at 63: I.L.R. 62 Cal. 499 (P.C.).

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assessed on that estate, and, in the event of a default in payment, the whole of the estate may be sold for the realisation of such amount as may be due to government. But the Bengal Land Revenue Sales Act (Bengal Act XI of 1859), which prescribes rules for the realisation of land revenue, provides that "a recorded sharer of a joint estate, held in common tenancy" (S. 10), or "a recorded sharer of a joint estate, whose share consists of a specific portion of the land of the estate" (S. 11), may, if he desires to pay his share of the revenue separately, ask the Collector to open a separate account with him for the payment of his share of the revenue separately from the other proprietors. The advantage of opening a separate account is that, when a default in the payment of land revenue takes place, the Collector "in the first place shall put up to sale only that share or those shares of the estate from which, according to the separate accounts, an arrear of revenue may be due" (S. 13); and the rest of the estate shall not be liable to sale unless "the highest offer for the share exposed to sale shall not equal the amount of arrear due thereupon to the date of sale" (S. 14).

A large number of the proprietors, who owned specific but undivided shares in Mahal Bisthazari, availed themselves of these provisions of the statute, with the result that the Collector opened separate accounts with them in respect of their liabilities for the payment of their shares of the land revenue. A large area of the estate, however, remained *ijmali* or joint share, and the owners of this *ijmali* share were still jointly liable for the payment of the land revenue in respect of it.

In 1901 there was an arrear of land revenue payable in respect of the *ijmali* share, and the Collector, in exercise of the power conferred upon him by the statute, sold the share, on the 9th September, 1901, by auction. The appellant's father Buijnath Goenka was certified to be the purchaser of that share, and obtained possession thereof on the 15th May, 1902.

Thereupon, the respondents with some of their co-sharers in the *ijmali* share, after an unsuccessful appeal to the Commissioner of the division, brought an action in the Court of the Subordinate Judge of Monghyr for the annulment of the sale, and for the possession of the property. The Trial Judge

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allowed their claim and granted them a decree for possession of the land with mesne profits. This decree, though reversed on appeal by the High Court, was restored by His Majesty in Council in 1915, with certain modifications which are not material to the present appeals.

It is the decree of the Subordinate Judge, which, as modified by the Privy Council, the respondents are seeking to execute. But before dealing with the execution of that decree, their Lordships consider it necessary to refer to the proceedings for the partition of the mahal which were commenced in 1876 but were not concluded until the 31st March, 1908. It is common ground that, before the partition, the respondents had shares in certain *ijmali* villages, and were also co-sharers in other villages in respect of which they had separate accounts. In lieu of their entire holding in the mahal they were awarded on partition three villages, namely, Singthu, Padmawat and Dhandh, and these villages were given a separate tauzi number. The interest of the respondents in the *ijmali* villages, which were sold in September, 1901, and purchased by Goenka, was represented by 6 annas, 9 gandas and 14 cowries in each of these three villages; and the remaining share in the villages represented their interest in the mahal in respect of which they had separate accounts.

It appears that, while Goenka was entitled to the fractional share specified above in each of the three villages, he took possession of the whole of the village Singthu, but did not get possession of any portion of the other two villages. There can be no doubt that the respondents obtained possession of these latter villages, and they have remained in actual possession of them to the exclusion of the appellant. But, on the 13th January, 1915, an order was made in the Land Registration Department that Goenka should be entered in the Collector's register *D* as owner in respect of 6 annas, 9 gandas and 14 cowries in Singthu as well as in the other two villages, and that the respondents should be registered in respect of the remaining share in each of the three villages.

After the decision of their appeal by His Majesty in Council, to which reference has already been made, the respondents applied for the execution of the decree for the recovery of the land, and also for the mesne profits thereof. They

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obtained possession of the land on the 7th May, 1918, and the dispute is now confined to two issues:—

(1) Whether the respondents are entitled to recover, from the appellant, mesne profits for the whole of the village of Singthu, or for only 6 annas odd share of it, during the period which will be presently described.

(2) Whether interest at the rate of 12 per cent. per annum, which has been awarded to them on the mesne profits, is excessive and should be reduced.

The period referred to in the first issue commenced on the 31st March, 1908, when the partition of the mahal was completed, and ended on the 13th January, 1915, when entries were made in register *D* recording the appellant to be the proprietor of 6 annas odd share in the village of Singthu, and the respondents as owners of the remaining share in that village." It is argued for the appellant that, as the interest purchased by him in 1901 was, on partition, represented by 6 annas odd share in Singthu, as in the other two villages, he was liable for mesne profits in respect of only that share in Singthu, but not in respect of the whole of the village in question. There is, however, no doubt that on the completion of the partition he came into actual possession of the entire 16 annas of that village, and that the respondents' possession was confined to the other two villages. This division of possession, which was convenient to both parties, might have been the result of an arrangement arrived at between them, as explained by the respondents; but the fact remains that the appellant realised the profits of the whole of the village Singthu, and not of the fractional share thereof. It is, however, urged that in his capacity as purchaser he was entitled to get possession and profits of only the fractional share, and that, if he realised more than his legitimate share, he did so as a trespasser. It was said that in that case he might be held liable for the excess profits in an appropriate action brought for the purpose, but that the respondents cannot recover from him those profits in the execution proceedings. It appears that, while he was entered as a co-sharer in the villages on the completion of the partition in March, 1908, the *quantum* of his share in them was not recorded until the 13th January, 1915, when the relevant entries were made in register *D*. During the intervening period his possession of the village of Singthu was

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referable only to his title as purchaser at the revenue sale, and he received profits on that basis only. He was admittedly a co-sharer in that village, and there is no warrant for the suggestion that, while he was in possession of an undefined share as purchaser, he should be deemed to be in possession of the remaining share as trespasser.

It is to be observed that the appellant has not been made liable for any share of the profits of the other two villages, though he was a co-sharer in them on the strength of his purchase, the reason being that he was neither in possession of any share therein nor realised any profits from them. So far as his liability for the entire profits of the village of Singthu is concerned, he cannot invoke any principle which would support his contention. Their Lordships, therefore, concur with the High Court in holding that his liability for the mesne profits of the whole of the village Singthu, which accrued during the period mentioned above, has been established.

The only other point, which requires determination, is what should be the rate of interest to be allowed on mesne profits. That interest should be awarded to the respondents is a matter which does not admit of any dispute. Indeed, the Indian law makes interest on mesne profits an integral part of mesne profits. It is enacted by S. 2, sub-S. (12) of the Code of Civil Procedure (Act V of 1908), that the expression "mesne profits of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits."

Now, the rate at which interest should be allowed is not mentioned in the statute, nor is there any stipulation in any contract bearing on the subject. The rate is, therefore, in the discretion of the Court, but the discretion must proceed on sound principles.

The learned Judges of the High Court think that 12 per cent. per annum is the ordinary rate of interest, which should be awarded on mesne profits. They, however, hold that "this rate should be calculated only up to the delivery of possession, and thereafter the usual Court rate of 6 per cent. per annum should be allowed." But no reason has been assigned for making the distinction between the rate of interest payable on mesne profits up to the date of the delivery of possession, and

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that to be awarded thereafter on the amount which represents profits found to be due on that date. In either case a sum of money is due to the decree-holder, and he is entitled to recover it with interest for the period during which it has been withheld from him. In the absence of a statutory provision or a special contract, there is no valid ground for awarding interest at a higher rate up to a certain date during that period, and at a lower rate after that date.

The cases decided by the Courts in India do not disclose any uniform rule as to the rate of interest which should be granted on mesne profits. The rate must depend upon a variety of circumstances, but, as decided by this Board in the case of *Secretary of State for India in Council* v. *Saroj Kumar Acharjya Choudhury*[1] six per centum per annum is, in the absence of special circumstances, a fair rate of interest. The rate awarded by the High Court in that case was 12 per cent. per annum, but it was reduced by the Board to 6 per cent. per annum.

There are no special circumstances in the present case which would justify the award of a higher rate of interest; and their Lordships are, therefore, of opinion that 6 per cent. per annum is a reasonable rate of interest which should be allowed for the whole of the period during which the decree-holders were deprived of the use of the money which was due to them. Interest at that rate should be calculated on the items on both sides of the account, that is to say, on the amount of the profits due to the respondents as well as on the sums credited to the appellant on account of the collection charges.

Their Lordships will, therefore, humbly advise His Majesty that the decrees of the High Court should be modified by the substitution of interest at 6 per cent. per annum for that at 12 per cent. per annum; but that in all other respects they should be affirmed. The appellant, having succeeded on only one point, should recover one-half of the costs of these appeals.

Solicitors for Appellant: *Henry S. L. Polak & Co.*
Solicitors for Respondents: *T. L. Wilson & Co.*

R. C. C. —— *Decree modified.*

1. (1934) 68 M.L.J. 580: L.R. 62 I.A. 53: I.L.R. 62 Cal. 499 (P.C.).

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR M. VENKATASUBBA RAO, *Officiating Chief Justice*, MR. JUSTICE CORNISH AND MR. JUSTICE VENKATARAMANA RAO.

Lakshmi Ammal and another .. *Appellants** (*Defendants*)

v.

Anantharama Aiyangar and another .. *Respondents* (*Plaintiffs*).

F.B.
Lakshmi Ammal *v.* Anantharama Aiyangar.

Hindu Law—Hindu Law of Inheritance (Amendment) Act (II of 1929)—Male dying before the Act but estate in the hands of a limited owner at date of the Act—Act applies to such a case—Suit by remoter reversioners—If and how for maintainable—Discretion of Court to try such a suit.

One *V* (last male holder) died in 1927 leaving behind him his mother *L*, who succeeded him, and *S*, a sister. *S* had a minor son. The plaintiffs as nearest presumptive reversioners brought a declaratory suit against *L* and *S* to declare a deed executed by them as invalid beyond *L's* lifetime. The son of *S* was not made a party to the suit. As at the date of suit Act II of 1929 had come into force,

Held, by the Full Bench that succession to *V* is to be determined by the provisions of the Hindu Law of Inheritance (Amendment) Act (II of 1929) and not by the law in force at the date of the last male owner *V's* death, as succession opens to the Hindu male only on the death of the limited owner and that therefore *S* and her son were nearer reversioners to *V* than the plaintiffs.

Krishnan Chettiar v. *Manickammal*, (1933) 66 M.L.J. 70: I.L.R. 57 Mad. 718, overruled.

Held, by the Division Bench (after the answer of the Full Bench) that though the law does not generally encourage declaratory suits by remote reversioners when nearer reversioners are in existence, still it is not always necessary that such suits should be dismissed and that in proper cases the Courts may allow the suit to go on, taking care to safeguard the interests of the nearer reversioners in existence. The Court, in the circumstances, held that the suit need not be dismissed simply because the plaintiffs were remoter reversioners but directed that the son of *S*, who was a nearer reversioner, shall be added as a party and the suit proceeded with on behalf of the reversioners in his presence.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No. 66 of 1927.

The Court (Madhavan Nair and Stone, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.—The genealogical table given at page 10 of the pleadings will help to understand the relationship of the parties.

The plaintiffs claim to be the nearest presumptive reversioners of one Venkatakrishna Aiyangar, the deceased son of the first

* Appeal No. 443 of 1930. 29th January, 1937.

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defendant, Lakshmi Ammal, and the brother of the second defendant, Sundarathammal, Rangaswami Aiyangar, the husband of Lakshmi Ammal and the father of Venkatakrishna Aiyangar, died on 17th September, 1924. Venkatakrishna Aiyangar was born after his father's death, on 18th May, 1925, and he died a minor on 11th July, 1927. On his death his mother Lakshmi Ammal succeeded him. The plaintiffs' case is that she has been mismanaging the estate and has been dealing with it unlawfully. Hence they instituted the suit out of which this appeal arises, for the appointment of a receiver for the management of the estate of Venkatakrishna Aiyangar and also for a declaration that the transaction styled a "partitioned release" effected by the defendants on the 15th September, 1927, is not valid beyond the first defendant's lifetime.

Various questions of law and fact were raised in the suit; but for the purpose of this reference it is necessary to refer only to one question, a question of law, raised by the second defendant. By an additional written statement she urged that by virtue of Act II of 1929, the Hindu Law of Inheritance (Amendment) Act, she and her son are nearer reversioners of Venkatakrishna Aiyangar than the plaintiffs and that the plaintiffs are not therefore entitled to maintain the suit. It is conceded that but for the alteration in succession introduced by Act II of 1929, if the Act is applicable the plaintiffs would be entitled to institute the suit. The main question for determination is whether Act II of 1929 would apply to this case and whether the second defendant and her son are nearer reversioners of Venkatakrishna Aiyangar than the plaintiffs.

Act II of 1929 altered the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate. The preamble of the Act states:

"Whereas it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate".

It is hereby enacted as follows and S. 2 lays down that a sister and sister's son are entitled to rank after certain other relations and next after the father's father and before a father's brother; provided a sister's son shall not include a son adopted after the sister's death. The section runs as follows:—

"A son's daughter, daughter's daughter, sister and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother: Provided that a sister's son shall not include a son adopted after the sister's death".

It is conceded that if the Act applies to this case, second defendant and her son would be nearer reversioners of Venkatakrishna Aiyangar than the plaintiffs.

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It is argued on behalf of the plaintiffs that the Act is intended to apply only to cases of Hindu intestate males who die after the passing of the Act, and reliance in support of the argument is placed on the language of the preamble. If this argument is accepted, it will follow that since the last male holder in the present case died in 1927 before the passing of the Act, the second defendant and her son cannot rely on the Act and claim to be the nearer reversioners. According to this view the critical date to be considered is the death of the last male owner. On the other hand the appellants argue that the critical date for consideration is not the death of the last male owner but is the death of the limited owner when the succession opens and since in the present case the first defendant is still living the Act will apply and the second defendant and her son will be the nearer reversioners. According to this view the question for decision is not whether the Act is retrospective.

In *Krishnan Chettiar* v. *Manickammal*[1], it was held, differing from the decisions in *Shib Das* v. *Nand Lal*[2] and *Bandhan Singh* v. *Daulata Kuar*[3], as follows: The Hindu Law of Inheritance (Amendment) Act (II of 1929) does not apply to cases of Hindu males who died intestate before its coming into force. In determining the order of succession to the estate of such persons the Hindu Law as it stood before the Act should be applied. The mere circumstance of the succession opening after the passing of the Act by the death of the limited owner is not enough to attract the provisions of this Act. It must also be shown that the opening of the succession is in respect of the estate of a Hindu male dying intestate after the passing of the Act. (*See* the head-note.) The decision of our Court did not find favour in the Patna High Court. In *Chulhan* v. *Mt. Akli*[4], Sir Courtney-Terrell, C. J., held:

"Where a widow is in possession of her husband's estate as limited owner the question whether certain persons are heirs under Act II of 1929 depends on the date of the death of the widow and not on the date of the death of the last male holder. In such cases the question is not whether Act II of 1929 is retrospective".

The learned Judge followed the decisions of the Lahore High Court in *Shib Das* v. *Nand Lal*[2] and *Bandhan Singh* v. *Daulata Kuar*[3]. In Appeal No. 256 of 1925, Curgenven and Bashyam Aiyangar, JJ., applied S. 2 of the Act to a case where the last male owner died before the passing of the Act. In that case the plaintiffs sued for a declaration that they are the reversioners of one Seshayya of whom the first defendant was the widow. Of the remaining

1. (1933) 66 M.L.J. 70 : I.L.R. 57 Mad. 718.
2. (1931) I.L.R. 13 Lah. 178. 3. A.I.R. 1933 All. 152.
4. A.I.R. 1934 Pat. 324.

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defendants the second defendant was the adopted son of Seshayya's sister Subbamma and defendants 3 to 7 were his children. One issue in the case, which was found in the affirmative by the Subordinate Judge, was whether the plaintiffs were the nearest reversioners to Seshayya. On this point the learned Judges stated:

" Since the disposal of the suit, however, there has been enacted Act II of 1929—Hindu Law of Inheritance (Amendment) Act—and by that Act the sons of certain female relatives, including a sister have been declared entitled to rank in order of succession next after father's father and before a father's brother; and it is not disputed that by virtue of this Act the defendants become nearer reversioners than the plaintiffs can claim to be, subject to one possible qualification".

And then they dealt with the proviso to S. 2 which says that a sister's son shall not include a son adopted after the sister's death. The question of an adopted son does not arise in this case. After saying that in that case they have no materials to decide conclusively whether the second defendant came within the proviso the learned Judges stated:

" However, Mr. Raghava Rao for the plaintiffs recognises that the situation so far as his clients are concerned has undergone a great change and very wisely he sees the uselessness of contending for the maintenance of the decree in the circumstances now arisen. . . . ."

This decision is an authority in support of the position contended for by the appellants and it is in conflict with the decision in *Krishnan Chettiar* v. *Manickammal*[1], relied on by the respondents. In their judgment in *Kalimuthu Pillai* v. *Ammamuthu Pillai*[2], Ramesam and Curgenven, JJ., stated as follows:—

" The only question for decision is who, according to Hindu Law, is the preferential heir, the plaintiff—the daughter's daughter's son—or the first defendant—the sister's son. As the succession opened in 1923 this case is not governed by the Hindu Law of Inheritance (Amendment) Act (II of 1929)".

It may be mentioned that the last male owner in that case, Kalimuthu, died in 1883. He had four wives of whom two survived him and the last of them died in January, 1923. The statement of the learned Judges would suggest that in a case if the succession had opened after the passing of the Act, they would hold that though the last male owner died before the passing of the Act, the Act would apply.

The decisions in *Krishnan Chettiar* v. *Manickammal*[1] and Appeal No. 256 of 1925 show that on the point under consideration there is a conflict of opinion in our High Court. The view of Ramesam and Curgenven, JJ., inferentially supports the decision in Appeal No. 256 of 1925. The question is admittedly one of consi-

1. (1933) 66 M.L.J. 70: I.L.R. 57 Mad. 718.
2. (1934) 67 M.L.J. 503.

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derable importance. In the circumstances we would refer to a Full Bench the question 'whether in a case like the present where the last male owner dies before the passing of Act II of 1929 and the succession opens after the passing of the Act, the said Act II of 1929—the Hindu Law of Inheritance (Amendment) Act—would apply. We may say that in our opinion the Act would apply. For the reasons mentioned in *Chulhan* v. *Mt. Akli*[1] and as the Act is intended to alter the order of succession, the critical date for its application would be the date when the succession would open, we would respectfully dissent from the decision in *Krishnan Chettiar* v. *Manickammal*[2].

All the other questions arising in the appeal will be heard if necessary, after the receipt of the opinion of the Full Bench on the above question.

B. Sitarama Rao for *S. Srinivasa Aiyangar* and *P. N. Appuswami Aiyar* for Appellants.

T. R. Venkatarama Sastriar, R. Krishnaswami and *K. S. Sankara Aiyar* for Respondents.

The opinion of the Full Bench was delivered by

Venkatasubba Rao, Offg. C. J.

The Officiating Chief Justice.—The question referred to the Full Bench is, whether succession to a Hindu male dying before the passing of Act II of 1929, leaving a female heir (a limited owner under the law) who is alive after the Act has come into force, is governed by the provisions of that Act. The last male holder was one Venkatakrishna, who died a minor on the 11th July, 1927. He was succeeded by his mother, Lakshmi Ammal (the first defendant) against whom the action has been brought by the plaintiffs claiming to be the presumptive reversioners, with a view to obtain certain reliefs in regard to her deceased son's estate. The plaintiffs' right is challenged by the sister of Venkatakrishna, Sundarathammal (the second defendant in the suit) and her son, who allege that under the Act, they have a preferential right to the succession; and if this contention is well founded, the plaintiffs would cease to be the nearest or presumptive reversioners. Act II of 1929 received the assent of the Governor-General on the 21st February, 1929, on which date it came into force.

1. A.I.R. 1934 Pat. 324.
2. (1933) 66 M.L.J. 70: I.L.R. 57 Mad. 718.

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The short question to be decided is, whether the succession to Venkatakrishna, who died before the Act leaving his mother as his immediate heir, is governed by that Act or by the law in force previously. This in turn depends upon the question, when does the succession to a Hindu male open?

This Act, as its preamble shows, has been passed with a view to alter the order of succession to a Hindu male dying intestate. In the present case, if Venkatakrishna, who was succeeded by his mother, is to be deemed as having died in 1927, the provisions of this Act, can have no operation. But the true principle seems to be, that under the Hindu Law, it is the death of the female heir that opens the inheritance to the reversioners, who till then possess an inchoate right, generally termed a *spes successionis*; in other words, the male holder is regarded by the law as having lived up to and died at the moment of the death of the female heir. When a female heir intervenes therefore, the fictional death of a Hindu male is something different from his actual death, the result being that the date of his death is for this purpose postponed to the death of the limited owner. If this principle is kept in mind, the question presents no difficulty. It would be begging the question to say that to adopt this view would be to give retrospective effect to the Act. If a male intestate succeeded by a female heir is assumed as dying on the day of his actual death, which happens to be before the Act, to apply the provisions of this enactment to such a person would undoubtedly amount to giving it retrospective effect. But the true doctrine of the Hindu Law is thus declared by their Lordships of the Judicial Committee:

> "The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband, if he had lived up to and died at the moment of her death". (*Moniram Kolita* v. *Keri Kolitani*[1].)

The position of a Hindu widow or other female heirs is an anomalous one, for, although she is said to possess a qualified interest, she can in certain circumstances alienate the entire estate. That she is thus in one sense the heir of the last male holder, cannot be disputed. Referring to the widow, their Lordships say that what she holds is " an estate of inheritance

1. (1880) L.R. 7 I.A. 115 at 154: I.L.R. 5 Cal. 776 (P.C.).

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to herself and the heirs of her husband". (*Moniram Kolita* v. *Keri Kolitani*[1].) The persons described here as the heirs of the last male holder are the reversioners, whose interests, so long as the female holder is alive is only contingent, " differentiated little, if at all, from a *spes successionis*". (*Janaki Ammal* v. *Narayanasami Aiyar*[2].) The case last cited is an instructive one. There, the Courts in India declared the plaintiffs to be the nearest reversionary heirs of the deceased Ramaswami Aiyar, after the lifetime of defendants Nos. 1 and 2, his widow and mother. Their Lordships of the Judicial Committee held that such a declaration was both unavailing and premature, for, as they point out:

> " The question of who is the nearest reversionary heir or what is the class of reversionary heirs, falls to be settled at the date of the expiry of the ownership for life or lives—that is to say, in the present case, at the death of the survivor of the appellant and her late husband's mother".

The Hindu Law conception is this:—So long as a female heir is alive, no one can claim any vested interest in the succession; *a fortiori* there is no vesting at the date of the male holder's death; in other words, the crucial date is that of the death of the female heir, on whose death alone the succession opens.

The Judicial Committee has repeatedly declared that the succession opens only on the death of the female heir. In *Moniram Kolita* v. *Keri Kolitani*[1] as already stated, their Lordships observe:

> " The succession does not open to the heirs of the husband until the termination of the widow's estate".

Again in *Thakurain Jaipal* v. *Bhaiya Inder*[3] after refusing to interfere with a declaration granted by the lower Courts in favour of certain reversionary heirs, their Lordships, in order to guard against any possible misapprehension, emphasise:

> " Whenever the inheritance opens by the death of the widow, the present decision will have settled nothing as to who should succeed ".

The same idea that the succession does not open prior to the death of the female heir, is again expressed in *Janaki Ammal* v. *Narayanasami Aiyar*[2] already quoted.

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1. (1880) L.R. 7 I.A. 115 at 154 : I.L.R. 5 Cal. 776 (P.C.).
2. (1916) 31 M.L.J. 225 : L.R. 43 I.A. 207 at 209 : I.L.R. 39 Mad. 634 (P.C.).
3. (1904) 14 M.L.J. 149 : L.R. 31 I.A. 67 at 70 : I.L.R. 26 All. 238 (P.C.).

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The plaintiffs' learned counsel has argued that there is what is known as a fixed line of succession, with which the Act could not have intended to interfere. The answer is simple. There is no interference with any vested rights at all. During the lifetime of the female heir it cannot be predicated who would be the reversioner who would succeed. Possibly, none who was alive at the death of the last male holder would eventually survive to succeed to his estate; how can it be then stated that any one's vested rights are interfered with? Again, a case may be conceived where a suit is brought for the safe guarding of the estate by the presumptive reversioner on behalf of all the reversionary heirs, but at the death of the female heir, not one of the reversioners existing at the date of the action, may be alive to reap the benefits of the decree. The notion therefore of a fixed line of succession seems opposed to the principles governing this branch of the law.

In our opinion, therefore, the plaintiffs are not the presumptive reversioners of Venkatakrishna, and we base that view upon what we consider is the true doctrine of the Hindu Law. As for the authorities, in all the decided cases this view has been taken excepting *Krishnan Chettiar* v. *Manickammal*[1]. In our opinion, that case, with great respect, was wrongly decided and it is unnecessary, having regard to what we have said, to discuss it in any detail. Moreover, in Allahabad, Lahore and Patna the view that we have indicated has prevailed *Bandhan Singh* v. *Daulata Kuar*[2], *Rajpali* v. *Surju Rai*[3], *Shib Das* v. *Nand Lal*[4], *Shakuntla Devi* v. *Kaushalya Devi*[5] and *Chulhan* v. *Mt. Akli*[6] and in some of those cases, especially in *Shakuntla Devi* v. *Kaushalya Devi*[5] the arguments adopted in *Krishnan Chettiar* v. *Manickammal*[1] have been fully answered.

In the result, we would answer the reference by stating that in a case like the present, the succession opens to the heirs of the last male holder after the passing of the Act and is therefore governed by its provisions.

[This Appeal and Memorandum of Objections came on for final hearing before Madhavan Nair and Stodart, JJ.]

1. (1933) 66 M.L.J. 70: I.L.R. 57 Mad. 718.
2. A.I.R. 1933 All. 152.
3. A.I.R. 1936 All. 507 (F.B.).
4. A.I.R. 1932 Lah. 361.
5. A.I.R. 1936 Lah. 124.
6. A.I.R. 1934 Pat. 324.

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The judgment of the Court was delivered by

Madhavan Nair, J.—The essential facts necessary for the disposal of the appeal have been stated in our order of reference to the Full Bench. The suit was instituted by the plaintiffs who were the nearest reversioners to the estate of the last male holder at the time of the institution of the suit. But the question was raised by the second defendant, having regard to Act II of 1929, that she and her son were nearer reversioners than the plaintiffs and that the latter are therefore not entitled to maintain the suit. The Full Bench has now answered the question that in a case like the present the succession opens to the heirs of the last male owner after the passing of the Act and is therefore governed by its provisions. It would follow from this decision that the second defendant and her son, that is, the sister and her son, are nearer reversioners to the estate of the late Venkatakrishna Aiyangar than the plaintiffs. It may be mentioned here that the son of the second defendant, who is a minor under her protection, is not a party to the suit.

On the answer of the Full Bench it is argued by the appellants that the plaintiffs not being the nearest reversioners, are not entitled to institute the suit and it must therefore be dismissed. On the other hand the respondents argue that the suit of the plaintiffs being of a representative character, need not necessarily be dismissed and that the merits of the appeal should be gone into. On these arguments the first question for our decision is whether the appellants' contention should be accepted and the suit should be dismissed.

The appellants' learned counsel referred to various cases. In the leading case of *Rani Anand Kunwar* v. *The Court of Wards*[1] to which reference is usually made in all the decisions dealing with this question, their Lordships of the Privy Council laid down the general rule that a declaratory suit

" must be brought by the presumptive reversioner, that is to say, by the person who would succeed if the widow were to die at that moment. Such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow or have precluded themselves from interfering. . . . . The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to

1. (1880) L.R. 8 I.A. 14: I.L.R. 6 Cal. 764 (P.C.).

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sue........In such a case......the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit."

In *Kali Charan Singh* v. *Bageshra Kunwari*[1] it was held that there is no ground for the proposition that it is competent to persons who are not in fact the nearest reversioners to sue where the actual nearest reversioner is a minor. In that decision it was pointed out by the learned Judges:

"Indeed, so far as we are aware, there is nothing to prevent the minor suing through a next friend at this stage."

In *Shib Das* v. *Nand Lal*[2], Mst. *R.*, having succeeded to the property of her deceased son, made a gift of the same to her daughter's son. The reversioners in the fourth degree were in April, 1925, granted a decree declaring that the gift would not affect their rights after the death of Mst. *R.*, but while the appeal from this decision was pending and while Mst. *R.* was still alive, the Hindu Law of Inheritance (Amendment) Act (II of 1929) came into force. This altered the order of succession so as to make the donee (sister's son), rank before the plaintiff-reversioners. It was held that as Mst. *R.* was still alive at the date of the coming into force of the new Act, the appeal must be accepted and the suit must be dismissed. (*See* the head-note.) In *Sita Saran* v. *Jagat*[3] it was held, following the Privy Council decision in *Rani Anand Kunwar* v. *The Court of Wards*[4] that if the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue. In such a case, upon a plaint stating the circumstance under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit. Amongst the other cases cited, reference may be made to *Ram Tawakal Tewari* v. *Mt. Dulari*[5] and *Chulhan* v. *Mt. Akli*[6].

Relying on these cases the appellants' learned counsel argues that the plaintiffs had no justification to proceed with the suit seeing that they are not the nearest reversioners,

1. (1925) I.L.R. 47 All. 929.
2. (1931) I.L.R. 13 Lah. 178.
3. (1927) I.L.R. 49 All. 815.
4. (1880) L.R. 8 I.A. 14; I.L.R. 6 Cal. 764 (P.C.).
5. A.I.R. 1934 All. 469.
6. A.I.R. 1934 Pat. 324.

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especially so since they did not make the minor son of the second defendant a party, even though it was pointed out to them that they should do so having regard to Act II of 1929.

The respondents contend that though suits by reversioners when nearer reversioners are in existence had been dismissed, it does not necessarily follow that they should in all cases be dismissed, that the Court has a discretion in such cases and that the plaintiffs may be allowed to go on with the suit. In *Deoki* v. *Jwala Prasad*[1] the plaintiff alleging himself to be the nearest reversioner of her husband brought a suit against a Hindu widow. At the time of the suit there was in existence a nearer heir, a minor daughter of the defendant who lived with her, but she was not made a party to the suit. The learned Judges pointed out that although it is not correct to say that the existence of a nearer female heir can always be ignored by the next male heir, yet even without any express proof of refusal, concurrence or collusion on her part the Court may exercise its discretion and grant declaratory relief to the male reversioner and without insisting upon the female heir being joined in the suit provided such a course is not prejudicial to her interests. This case is strongly relied upon by the respondents to show that cases may arise where even when a nearer reversioner is not made a party relief may be given in a suit by a remote reversioner. In *Subba Rao* v. *Venkayya*[2]:

"Plaintiffs as reversioners brought this suit in 1927 for a declaration that an adoption alleged to have taken place in June, 1921, was neither true nor valid. By the time the suit came on for trial Act II of 1929 had been passed, with the result that defendants 5 to 7 became nearer heirs than the plaintiffs, and got themselves impleaded as parties. Defendants 5 to 7 did not support the adoption but asked for a declaration in terms of the plaint. It was contended that the plaintiffs ceased to be the nearest reversioners as soon as Act II of 1929 came into force and that they had no *locus standi* to maintain the suit. The learned Judges held that there was no legal bar to the maintainability of the suit and that the declaration could be granted. A dismissal of the suit in the circumstances would practically amount to the preclusion of the possibility of the declaratory suit in this case and defeat the policy of the law underlying the principle that suits relating to the status of a person should as far as possible be tried within a reasonable time and, before evidence bearing upon the question is lost by lapse of time". (*See* the headnote.)

Reference was also made to the decision in *Baldeo Dube* v. *Shamdhur Pande*[3] to show that declaratory reliefs are always matters of discretion for the Court.

1. (1928) I.L.R. 50 All. 678.
2. (1936) M.W.N. 1111.
3. (1914) 23 I.C. 809.

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An examination of the above decisions reveals that though the law does not generally encourage declaratory suits by remote reversioners when nearer reversioners are in existence, still it is not always necessary that such suits should be dismissed, for Courts in a proper case may well allow the suit to go on, taking care to safeguard the interests of the nearer reversioners in existence. In this connection attention may be drawn to the following passage in *Rani Anand Kunwar* v. *The Court of Wards*[1] already quoted:

> " In such a case the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue and would probably require the nearest reversioner to be made a party to the suit".

In the present case the entire evidence with respect to the relief asked for has been given by the plaintiffs and Ex. G has been declared by the lower Court to be valid only during the lifetime of the first defendant. The acts of the first and second defendants have been shown to be prejudicial to the interest of the plaintiffs. They may be prejudicial to the interest of the minor son of the second defendant also. Of course the second defendant sided with the first defendant, her mother. What the attitude of the minor son in this matter may be, cannot be stated at the present moment because he is not a party to the suit. As pointed out in *Rani Anand Kunwar* v. *The Court of Wards*[1] and in *Kali Charan Singh* v. *Bageshra Kunwari*[2] it appears to us that the proper action to be taken in this case should be to ask the plaintiffs-respondents to make the minor son of the second defendant a party-defendant to the suit, so that the case on behalf of the reversioners may once for all be tried and disposed of. At present the second defendant's son is a minor and under the protection of his mother. He being a minor his interest will have to be represented by a guardian. In the circumstances of this case it will not be proper to make the mother his guardian. We would therefore set aside the decision of the lower Court and give permission to the plaintiffs to proceed with the suit making the second defendant's minor son a party to the suit represented by a proper guardian. We are told that his paternal uncle and paternal grandfather could well represent his interests; but who his proper guardian should be, must be left for the

1. (1880) L.R. 8 I.A. 14: I.L.R. 6 Cal. 764 (P.C.).
2. (1925) I.L.R. 47 All. 929.

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decision of the parties and of the Court. After the minor son is made a party-defendant, if his guardian wishes he may transpose himself as a plaintiff if necessary. We asked the counsel whether they would be in a position to agree, after making the second defendant's son a party to the suit, to accept the evidence already recorded as evidence for the purpose of the continuance of the case, but they have not been able to give us any assurance on the point. If the guardian insists that the case must go on afresh, he may file his statement and the case will have to be heard and tried *de novo*. We set aside the decision of the lower Court and remand the entire case for proper disposal according to law in the light of our observations. Having regard to the course the case has taken we express no opinion on the various findings recorded by the lower Court. The appellants are entitled to get the costs of this appeal. No costs on the memorandum of objections. The other costs will be provided for in the decree of the lower Court.

The court-fee will be refunded both in the appeal and in the memo. of objections.

S. V. V. ——— *Appeal allowed and remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice.*

S. Soomar Sait & Sons by their partner A. M. Soomar Sait .. *Petitioners* (Plaintiffs)*

v.

P. V. Cherian .. *Respondent (Defendant).*

Soomar Sait & Sons *v.* Cherian.

Indian Partnership Act (IX of 1932), S. 69—Cutchi Memons carrying on father's trade—Suit by them—Whether they can sue—Not governed by Hindu Law principles.

Where the plaintiffs, who were Cutchi Memons and members of the same family carrying on business of their father's, sued the defendant for the purchase money of a second-hand car they had sold to him and the defence was that by reason of S. 69 of the Indian Partnership Act the plaintiffs being an unregistered partnership were not entitled to sue.

Held, that the plaintiffs being an unregistered partnership were not entitled to sue since the Cutchi Memons were not governed by the Hindu Law in regard to their property.

* C. R. P. No. 209 of 1936. 26th February, 1937.

Soomar Sait & Sons v. Cherian.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Ootacamund in S.C.S. No. 718 of 1935.

V. G. Row for Petitioners.

T. Krishnaswami Aiyangar and *S. K. Narasimhachari* for Respondent.

The Court delivered the following

JUDGMENT.—The lower Court's decision is correct. The plaintiffs are Cutchi Memons carrying on business as motor dealers. They are members of the same family carrying on the business of their father's before he died. They sued in the lower Court for the price of a second-hand motor car sold by them to the defendant. One defence raised was that by reason of S. 69 of the Indian Partnership Act the plaintiffs being an unregistered partnership were not entitled to sue and that contention the lower Court upheld and dismissed the suit on that as well as on other grounds. The argument there was that Cutchi Memons are to be included in the latter part of S. 5 of the Indian Partnership Act which reads:

"The relation of partnership arises from contract and not from status; and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business."

It is argued here by Mr. V. G. Row that this is a partnership which arises from status and not from contract because it should be held that Cutchi Memons stand in an analogous position to Hindu undivided families carrying on their family business. The lower Court held that there was no substance in such a contention, and that Cutchi Memons are only governed by the Hindu Law as regards succession and inheritance and that the principles of Hindu Law cannot be applied to their property. I am quite satisfied that the Cutchi Memons bear no resemblance to Hindu undivided families; and therefore the lower Court's decision upon this point was perfectly correct and the petition must be dismissed with costs.

K. C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE VENKATARAMANA RAO.

Davood Mohideen Rowther .. *Petitioner* in both*

v.

Sahabdeen Sahib .. *Respondent in both.*

Davood Mohideen Rowther *v* Sahabdeen Sahib.

Provincial Insolvency Act (V of 1920), Ss. 28 and 29—Effect—Adjudication in insolvency—Subsequent suit by creditor for recovery of debt—Failure to obtain leave of Insolvency Court—Suit whether rendered incompetent—Leave whether can be granted at later stage of suit—Meaning of expression "pending suit".

The effect of Ss. 28 and 29 of the Provincial Insolvency Act of 1920 is that after an order of adjudication is made no suit or other proceeding can be instituted against the insolvent or his property without the leave of the Insolvency Court, such leave being a condition precedent to the action. Thus after a person is adjudged insolvent a suit cannot be filed by a creditor for recovery of a debt provable in insolvency without the leave of the Insolvency Court, and it will not be open to the Insolvency Court to grant leave subsequently so as to cure the initial defect and permit the continuance of the suit.

Ghouse Khan v. *Bala Subba Rowther* (1927) 53 M.L.J. 412: I.L.R. 51 Mad. 833; *Maya Ookeda* v. *Kuverji*, (1931) 34 Bom.L.R. 649; *Rowe & Co.* v. *Tan Thean Taik*, (1924) I.L.R. 2 Rang. 643 and *Panna Lal-Tassaduq Hussain* v. *Hira Nand-Jiwan Ram*, (1927) I.L.R. 8 Lah. 593, referred to.

Brownscombe v. *Fair*, (1887) 58 L.T. 85; *Mahomed Haji Essack* v. *Abdul Rahiman*, (1916) I.L.R. 41 Bom. 312; *Bhimaji* v. *Chunilal Jhaverchand*, (1931) I.L.R. 57 Bom. 623; *Ponnusami* v. *Kaliaperumal*, A.I.R. 1929 Mad. 480 and *Subramanyam* v. *Narasimham*, (1928) 56 M.L.J. 489 at 497, considered.

The word "pending" in S. 29 of the Provincial Insolvency Act means "begun but not carried out or finished", and a pending suit means a suit already begun but not finished when the order of adjudication is made.

Petitions under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tanjore in S. C. S. No. 219 of 1934.

The Civil Revision Petitions came up in the first instance before Venkataramana Rao, J., who made the following

ORDER OF REFERENCE TO A BENCH.—This case raises a question of some importance relating to the construction of S. 29 of the Provincial Insolvency Act. A few facts may be necessary for the appreciation of the exact point involved in the case. On 11th March, 1924, the defendant in this case executed an usufructuary mortgage in favour of one Haidersa Rowther. On the said date the property was subject to a simple mortgage. The simple mortgagee sued to enforce the security, obtained a decree, and, in execution thereof, purchased the property and dispossessed Haidersa on 25th July, 1928. In the meantime the mortgagor applied to the

* C. R. Ps. Nos. 1295 of 1935 and 1167 of 1936. 11th February, 1937.

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Insolvency Court for adjudicating him an insolvent and the order of adjudication was passed on 8th August, 1928. The insolvency has not terminated as the insolvent has not obtained his final discharge. It appears that Haidersa was adjudicated insolvent and the Official Receiver sold all the outstandings due to the estate of Haidersa, and at the auction sale the plaintiff in this suit purchased the claim of Haidersa against the defendant in pursuance of the usufructuary mortgage executed in his favour. That claim was to recover money due under the mortgage under S. 68 of the Transfer of Property Act by reason of the dispossession on 25th July, 1928. The plaintiff instituted this suit on 18th April, 1934, to recover the money due under the mortgage by reason of his purchase. He did not obtain leave of the Insolvency Court as required by S. 28 (2) of the Act. The defendant did not plead the bar of S. 28 (2) in his original written statement but later filed an additional written statement raising this plea. In answer to this the plaintiff filed an application under S. 29 for leave to continue the proceedings, and the leave was granted. The question, therefore, is whether it is open to the Court to grant such leave under S. 29. Under S. 28 (2) on the making of an order of adjudication, except as provided by the Act, no creditor to whom the insolvent is indebted in respect of any debt provable under the Act shall commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose. The section in my opinion imposes a condition precedent to the right of action. It has been construed to be so by a Bench of this Court in *Ghouse Khan* v. *Bala Subba Rowther*[1] and it has also been held that it was not open to the Insolvency Court to grant leave subsequently and cure the initial defect. Wallace, J., observes in *Ponnusami* v. *Kaliaperumal*[2] that the absence of leave is not only a bar to the original institution of the suit, but that a suit commenced without leave cannot be continued by obtaining leave at any subsequent stage thereto. But in *Ghouse Khan* v. *Bala Subba Rowther*[1], Odgers, J., made an observation to the following effect, that even where a suit has been instituted without the leave of the Insolvency Court it would be open to the plaintiff to apply to the Court before whom the suit was instituted for leave and that such leave could be granted. It was on the strength of that observation that the learned Judge in this case allowed the plaintiff to continue the suit. Taking Ss. 28 and 29 together it seems to me that S. 29 contemplates proceedings pending on the date of the adjudication and not suits instituted subsequent to the order of adjudication. Else it seems

1. (1927) 53 M.L.J. 412: I.L.R. 51 Mad. 833.
2. A.I.R. 1929 Mad. 480.

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to me that the condition precedent imposed by S. 28 (2) will become nugatory. But a different view seems to have been taken in Bombay on the corresponding S. 18 (3), of a Presidency Towns Insolvency Act where the language is similar. In *Mahomed Haji Essack* v. *Abdul Rahiman*[1] the learned Judges say that even though leave has not been obtained under S. 17 of the Presidency Towns Insolvency Act it is open to the Court before whom a suit is instituted to grant leave, and pending the suit the proceedings under S. 18 (3) of the Presidency Towns Insolvency Act may be stayed. In doing so Sir Basil Scott, C.J., purported to follow the decision of the English Court reported in *Brownscombe* v. *Fair*[2]. That case was decided on the construction of Ss. 9 and 10 of the English Bankruptcy Act, 46 and 47 Vict., Ch. 52. In S. 9 we find a similar clause corresponding to S. 28 (2) of the Provincial Insolvency Act where a creditor cannot commence an action without leave of the Insolvency Court. The language of S. 10 of the said English Bankruptcy Act is similar to S. 29 of the Indian Act. It says that any Court in which proceedings are pending against a debtor may on proof that a bankruptcy petition has been presented by or against the debtor either stay the proceedings or allow them to continue on such terms as it may think just. In that case the Master and the learned Judge before whom the original case came up allowed the suit to be continued. On appeal, Wills, J., stayed the action. In doing so he made the following observation:

> " The intention of the Legislature in the Bankruptcy Act was, that on the bankruptcy of a man no more litigation between the bankrupt and his creditors should be permitted except in special circumstances, such as where a case was at the time of the bankruptcy ripe for trial in which the amount of the proof against the bankrupt's estate would not be seriously affected. But there must be such circumstances; in the present case there is nothing exceptional. Mr. Rose Innes says that the jurisdiction of the Court is limited to actions commenced before the bankruptcy proceedings are initiated; but I do not think so, for the words are perfectly general."

These observations seem to indicate that even though leave has not been obtained in the first instance it is open to the Court before whom the suit is pending to stay the action or continue it. As the provisions of the Indian Law are more or less based upon the English Bankruptcy Act, the decision of Wills, J., is of some importance in the construction of the Indian Act. But I must say that the Lahore High Court has taken a different view, namely, the view which I have already indicated that taking Ss. 28 and 29 together what is contemplated is proceedings pending on the date of the adjudication and not proceedings instituted after the order of adjudication. It is therefore desirable that this matter should

1. (1916) I.L.R. 41 Bom. 312. 2. (1887) 58 L.T. 85.

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be considered by a Bench as the question is one of frequent recurrence. I therefore refer this matter to a Bench.

[On this reference the petitions came up before a Bench as constituted above.]

T. R. Srinivasan for Petitioner in C. R. P. No. 1295 of 1935.

R. Viswanatha Aiyar and *T. R. Srinivasan* for Petitioner in C. R. P. No. 1167 of 1936.

S. K. Ahmed Meeran for Respondent in both cases.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—The facts sufficient for the disposal of these revision petitions are fully stated in the order of reference and it is unnecessary to repeat them. On those facts the question arises whether, after a person is adjudged an insolvent, a suit filed by a creditor for the recovery of a debt provable in insolvency without the leave of the Insolvency Court is maintainable and can the Court in which the suit is instituted give leave to continue it? The sections of the Provincial Insolvency Act relevant to this question are Ss. 28 and 29. S. 28, cl. 2 runs thus:

"On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceedings, except with the leave of the Court and on such terms as the Court may impose".

S. 29 runs thus:

"Any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made against him under this Act, either stay the proceeding, or allow it to continue on such terms as such Court may impose".

Unhampered by authority, reading both sections together and giving the words their plain and natural meaning the following propositions are clearly deducible:

(*i*) S. 28 (2) is mandatory and after an order of adjudication is made, no suit or other proceeding can be instituted against the insolvent or his property without the leave of the Insolvency Court and such leave is a condition precedent to the right of action; and

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(*ii*) where any suit or other proceeding is pending on the date of the adjudication in any Civil Court, such Court on being apprised of the order of adjudication can in its discretion either stay the suit or proceeding or give leave to continue the same.

It will be seen that S. 27 which deals with the power of Insolvency Courts to make an order of adjudication is the first of the sections enacted under the heading "Order of adjudication". The succeeding sections deal with the legal consequences which follow from the order of adjudication. Thus the point of time in relation to which both Ss. 28 and 29 speak is the date of the order of adjudication. S. 28 deals with proceedings not pending on the date of the order of adjudication and S. 29 deals with proceedings then pending. The term "pending" literally means "begun but not yet carried out or finished". Therefore when S. 29 speaks of a suit pending, it refers to a suit already begun but not finished when the order of adjudication is made. (See *Subramanyam* v. *Narasimham*[1].) In the view that under S. 28 leave of the Court is a condition precedent to the right of action, no other interpretation of S. 29 is possible. If leave is a condition precedent, the want of it is a defect fatal to the suit and subsequent leave cannot validate it. If it be held that leave can be given under S. 29 to continue a suit commenced without the leave of the Insolvency Court, it would be rendering S. 28 nugatory. To illustrate, suppose a District Court before which proceedings in insolvency are pending refuses to grant leave to a creditor to institute a suit against an insolvent; after such refusal the creditor files a suit in the District Munsif's Court and it can grant leave to continue the suit; this means the District Munsif will be sitting as it were in judgment against the order of the District Judge, a state of affairs which could never have been in the contemplation of the legislature in enacting the Provincial Insolvency Act, whatever may be the English Law or the law of insolvency which governs the presidency towns about which we shall presently deal.

An argument based on hardship to the creditor resulting from this interpretation was addressed to us relying on certain decisions. (Vide *Subramanyam* v. *Narasimham*[1] and *Bhimaji* v. *Chunilal Jhaverchand*[2].) It is this: a credi-

1. (1928) 56 M.L.J. 489 at 492 and 493.
2. (1931) I.L.R. 57 Bom. 623.

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tor for no fault of his in ignorance of the adjudication files a suit; it would be unjust to dismiss the suit for want of leave and it may be at the time of dismissal his claim may be barred and he will be practically remedyless. When the words of the statute are plain, a Court of law cannot refuse to give them their natural meaning because of a possibility of hardship or injustice; moreover, as pointed out by Wallace, J., in *Ponnusami* v. *Kaliaperumal*[1] there is really no such hardship. As observed by him at page 481:

> "The gazette notification of insolvency is presumed to be notice to all the creditors and they cannot be heard to plead want of notice or ignorance. On the other hand, unless this strict reading of the section is adopted there will be great embarrassment both to the insolvent and the Insolvency Court".

There is preponderance of Indian authority in support of the view we are taking. In *Ghouse Khan* v. *Bala Subba Rowther*[2], Odgers and Curgenven, JJ., held that leave of the Insolvent Court is a condition precedent to the institution of a suit and failure to obtain such leave is a defect which cannot be cured and leave subsequent to the institution of the suit cannot be given. They followed the decision in in re *Dwarkadas Tejbhandas*[3], given on an analogous provision in the Presidency Towns Insolvency Act (S. 17). In *Ponnusami* v. *Kaliaperumal*[1], Wallace, J., held that even subsequent annulment of insolvency would not cure the initial defect. It must be noticed that Wallace, J., was inclined to take a different view in cases of ignorance of the creditor of the insolvency. (See *Subramanyam* v. *Narasimham*[4]). In *Maya Ookeda* v. *Kuverji*[5], Blackwell, J., following in re *Dwarkadas Tejbhandas*[3], dismissed a suit instituted without such a leave. (See also *Panna Lal-Tassaduq Hussain* v. *Hira Nand-Jivan Ram*[6] and *Rowe & Co.* v. *Tan Thean Taik*[7].) We may point out that in *Ghouse Khan* v. *Bala Subba Rowther*[2], in re *Dwarkadas Tejbhandas*[3] and *Panna Lal-Tassaduq Hussain* v. *Hira Nand-Jivan Ram*[6] the creditor filed the suit in ignorance of the order of adjudication and yet this circumstance did not affect the decision in these cases.

We shall now deal with the argument in support of the contrary view based mainly on an English decision in *Browns-*

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1. A.I.R. 1929 Mad. 480.
2. (1927) 53 M.L.J. 412: I.L.R. 51 Mad. 833.
3. (1915) I.L.R. 40 Bom. 235.
4. (1928) 56 M.L.J. 489 at 497.
5. (1931) 34 Bom.L.R. 649.
6. (1927) I.L.R. 8 Lah. 593.
7. (1924) I.L.R. 2 Rang. 643.

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combe v. *Fair*[1] and *Mahomed Haji Essack* v. *Abdul Rahiman*[2] which followed it. It is contended that the words in S. 29 are general and wide enough to cover suits instituted before and after the date of the order of adjudication; and such a construction was adopted in construing S. 10 (2) of the English Bankruptcy Act of 1883 where the language was similar. Ss. 9 and 10 of the English Bankruptcy Act of 1883 so far as they are relevant for the present discussion are in these terms:

"S. 9. (1) On the making of a receiving order an Official Receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose".

" S. 10. (1). * * * * "

" S. 10. (2) The Court may at any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor, may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings, or allow them to continue on such terms as it may think just".

It does not appear from the report of *Brownscombe* v. *Fair*[1] whether the order was passed under the first portion of S. 10 (2) or under the later portion thereof. But from the arguments of Mr. Read and Mr. Rose Innes it may be taken that the order was made under the later provision of S. 10 (2) which is similar in language to S. 29 of the Provincial Insolvency Act and S. 18 (3) of the Presidency Towns Insolvency Act. The following observations of Willis, J., in that case do lend countenance to the argument at the Bar:

" Mr. Rose Innes says that the jurisdiction of the Court is limited to actions commenced before the bankruptcy proceedings are initiated but I do not think so, for the words are perfectly general."

With due respect, we may point out that the plain language of the section does not warrant this interpretation. S. 9 deals with proceedings not pending on the date of the receiving order and S. 10 with proceedings so pending. That this is the correct view seems to be borne out by the observations of Stirling, J., in In re *Berry*: *Duffield* v. *Williams*[3]:

" S. 9 prohibits the 'commencing' of actions or proceedings, except with the leave of the Court; and I agree with the opinion expressed by Worth, J.,

1. (1887) 58 L.T. 85.
2. (1916) I.L.R. 41 Bom. 312.
3. (1896) 1 Ch. 939 at 946.

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in In re *Wray* (*a Solicitor*)[1] that it has no reference to proceedings actually pending against the debtor at the date of the receiving order. Such receiving proceedings are dealt with by S. 10, sub-S. 1 of which applies to the interval between the presentation of a bankruptcy petition and the making of a receiving order; while sub-S. 2 applies to any time after the presentation of a bankruptcy petition. The scheme appears to be that actions and other proceedings are to go on against the debtors unless either the Court of Bankruptcy or the Court in which the proceedings are pending sees fit to interfere in the exercise of the discretion vested in it".

It may be noted that in Halsbury's Laws of England, Vol. 2 at p. 63 *Brownscombe* v. *Fair*[2] is cited as an authority for the proposition that actions which are commenced after the receiving order without the leave of the Court may be stayed but in the footnote it is added "They are stayed under the Bankruptcy Act, 1883, S. 9". (*See also* Vol. 2, Hailsham's Ed., p. 90.) Similarly in William's Bankruptcy Practice (14th Ed. 1932), at p. 70, the same case is given as an authority for the said proposition under S. 7 of the English Bankruptcy Act, 1914, corresponding to S. 9 of Act of 1883 which is the same as S. 28 of the Provincial Insolvency Act and S. 17 of the Presidency Towns Insolvency Act. Thus it will be seen that *Brownscombe* v. *Fair*[2] is not treated as an authority for the exercise of such a power under S. 10 (2). It is therefore not safe to construe S. 29 in the light of the decision of *Brownscombe* v. *Fair*[2]. The decision in *Mahomed Haji Essack* v. *Abdul Rahiman*[3] is a decision under S. 18, cl. 3 of the Presidency Towns Insolvency Act and Ss. 17 and 18 are a reproduction of Ss. 9 and 10 of the English Bankruptcy Act, 1883. Sir Basil Scott, C.J., follows *Brownscombe* v. *Fair*[2] without any discussion and the decision cannot be relied on as an authority on S. 29 of the Provincial Insolvency Act. Two other cases of the Bombay High Court were cited, namely, the decision of Fawcett, J., in *Bheraji Samrathji* v. *Vasantrao*[4] and the decision of Tyabji, J., in *Bhimaji* v. *Chunilal Jhaverchand*[5]. Both the learned Judges followed in *Mahomed Haji Essack* v. *Abdul Rahiman*[3] but Fawcett, J., observed that if the matter were *res integra* a different view might be open and he referred to *Panna Lal-Tassaduq Hussain* v. *Hira Nand-Jivan Ram*[6] in support of that view. The decision in *Subramanyam* v. *Narasimham*[7] is distinguishable. There the

1. (1887) 36 Ch. D. 138 at 143.
2. (1887) 58 L.T. 85.
3. (1916) I.L.R. 41 Bom. 312.
4. (1928) 31 Bom. L.R. 981.
5. (1931) I.L.R. 57 Bom. 623.
6. (1927) I.L.R. 8 Lah. 593.
7. (1928) 56 M.L.J. 489.

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question was whether a decree passed in a suit instituted without leave in the absence of any objection being taken on that score is a nullity. It is unnecessary to deal with the correctness of that decision but we must express our dissent from the observations contained in the judgment in regard to the interpretation of Ss. 28 and 29 of the Provincial Insolvency Act in so far as they purport to be based on the theory of ignorance of the creditor of the proceedings in insolvency. Tiruvenkatachariar, J., in that case observes that the word "commenced" must be construed as "knowingly commenced". Wallace, J., seems inclined to this view though he says that having regard to the preponderance of authority he would not dissent from the view he took in *Ponnusami* v. *Kaliaperumal*[1]. It seems to us that there is no warrant for importing into the section words which are not there. In *Ghouse Khan* v. *Bala Subba Rowther*[2] there is no doubt an observation of Odgers, J., at page 839 to the effect that leave may be obtained under S. 29 though the suit might have been instituted without the leave of the Insolvency Court but it is an *obiter dictum* which was not necessary for the case. Further the observation is irreconcilable with the view taken by him in regard to S. 28 of the Act that want of leave is fatal to the suit.

We are therefore of opinion on a proper construction of Ss. 28 and 29 of the Provincial Insolvency Act that leave of the Insolvency Court not having been obtained prior to its institution, the present suit is not maintainable and the learned Subordinate Judge had no power to grant leave to continue the suit. We therefore reverse the decision of the lower Court and dismiss the suit but in the circumstances we direct each party to bear his own costs.

C. R. P. No. 1167 of 1936.

This Civil Revision Petition arises out of an application for the execution of a decree obtained by the respondent against the petitioner in Small Cause Suit No. 219 of 1934 on the file of the Sub-Court, Tanjore. In the judgment delivered to-day in C. R. P. No. 1295 of 1935 we decided that the said suit was not maintainable, set aside the decree and dismissed the suit. This Civil Revision Petition must therefore be allowed and the execution petition dismissed, but in the circumstances we

1. A.I.R. 1929 Mad. 480. 2. (1927) 53 M.L.J. 412: I.L.R. 51 Mad. 833.

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direct each party to bear his own costs both here and in the Court below.

B. V. V. —— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Velayudham Pillai, *In re.*

Velayudham Pillai and another .. *Appellants* (Accused —Prisoners).*

Indian Penal Code (XLV of 1860), Ss. 109, 232, 235 and 242—Counterfeit coins—Manufacture of—Intention to foist a case on an innocent man but not for infringing monopoly of the state or defrauding the public—Prosecution case misconceived—Charges should have been under Ss. 211 and 195, Indian Penal Code.

Where two accused were charged under Ss. 109, 232, 235 and 242, Indian Penal Code, but the facts found were that the first accused with the help of the second surreptitiously introduced the counterfeit coins, so made, into another person's house, in order to foist a case against him and not for the purpose of actually getting the coins so made to be put in circulation,

Held, that the prosecution had entirely misconceived the sections under which the accused ought to have been prosecuted; the real complaint of the Crown or society against these accused was not that they had made a number of coins to look like genuine coins but that they had dishonestly attempted to bring an innocent man to trouble by means of coins which they had made. They ought certainly to have been prosecuted for the real offences which they had committed, namely, falsely causing criminal proceedings to be taken against an innocent man under S. 211, Indian Penal Code, or for fabricating false evidence against him under S. 195, Indian Penal Code. It was clear that the appellants (accused) were not persons who were manufacturing coins with the intention of infringing the monopoly of the mint or of causing loss to the currency owning public. Since the coins which were seized in this case and which were the subject-matter of the charges were not counterfeit coins because it was clear from the prosecution case that the intention of the accused in manufacturing them was merely to make use of them in order to assist them in filing a false charge, the accused were not guilty of the charges framed and therefore acquitted of the charges.

Appeal against the judgment dated 11th day of November, 1936, of the Additional Sessions Judge of the Court of Session of the Coimbatore Division in Case No. 130 of the Calendar for 1936.

V. L. Ethiraj and *A. S. Sivakaminathan* for Appellants.

Parakat Govinda Menon for *The Public Prosecutor* on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The two appellants have been convicted in this case by the learned Additional Sessions Judge of

* Cr. App. No. 666 of 1936. 6th April, 1937.

Velayudham Pillai, *In re.*

Coimbatore of various charges connected with the manufacture of what, according to the prosecution, are counterfeiting King-Emperor's coins during May, 1936. The facts found by the learned Judge and, in view of the legal argument to which I shall refer later, not seriously challenged in the appeal before me, were that the first appellant instructed the second appellant to make for him a number of two anna pieces and that when these pieces were manufactured he made most of them up into a bundle which he gave to P. W. 3, his servant, with instructions that P. W. 3 should surreptitiously introduce them into the shop of P. W. 6 with whom he had lately conceived various grounds of enmity. P. W. 3 accordingly took the bundle and placed it in P. W. 6's shop. Information was then given to the police to the effect that if they searched P. W. 6's shop and house they would discover that he had counterfeit coins in his possession. A search was accordingly made and the bundle was duly discovered. It is on these facts that the two appellants were charged. There were four charges against them. The first was against the first accused that some days before the 24th May, 1936, he had abetted the counterfeiting of King-Emperor's two anna coins by the second accused and therefore he had committed an offence punishable under Ss. 109 and 232, Indian Penal Code. The second charge was that the second accused had actually counterfeited those coins and committed an offence punishable under S. 232, Indian Penal Code. The third charge was that the first accused had on the 24th May, 1936, been in possession of certain materials knowing or having reason to believe that they were intended to be used for the purpose of counterfeiting coins, an offence punishable under S. 235, Indian Penal Code. And fourthly the first accused was charged at about the same time and place with being in possession of counterfeit coins fraudulently or with intent that fraud might be committed, an offence punishable under S. 243, Indian Penal Code. I ought at this stage to add that in addition to the counterfeit coins discovered by the police in P. W. 6's shop a few more coins said to be similar in design to those were also discovered in a cash box in the first accused's house.

The argument that has been pressed before me in appeal is a very ingenious one which does not seem to have occurred either to the learned Additional Sessions Judge or to any of the parties at the trial. It is this, that if coins are made to

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resemble genuine coins and the intention of the makers is merely to use them in order to foist a false case upon their enemies, those coins do not come within the definition of "counterfeit coins" given in the Indian Penal Code. I think there can be no doubt that this argument must be accepted. The definition of "counterfeit" is to be found in S. 28, Indian Penal Code. A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised. The important words for our present purpose in that definition are "intending by means of that resemblance to practise deception." Now if the intention of a person who makes or causes coins to be made is to use them in order to commit some other offence such as giving false information against an enemy, that intention *prima facie* is not to practise such deception. If we examine the situation in the present case we find that it was exactly the reverse of that intention. It was obviously the intention of the first accused that the police officers should be the first to see these counterfeit coins and that they should not be deceived by their appearance because if they were deceived then the whole purpose of making the complaint to the police against P. W. 6 would be frustrated. It is clear therefore that if the object of the manufacturer was to carry out this nefarious scheme of foisting a false case on P. W. 6, these coins are not counterfeit because they do not fall within the definition of S. 28. Of course there is no direct evidence in this case that the first accused and the second accused were heard talking over the details of their plot. It is conceivable, theoretically, that all that the first accused did was to go to the second accused and ask him to make counterfeit coins without disclosing to him the reason why he wanted them. But on the other hand it is quite clear from the way in which the case has been treated and discussed in the judgment of the learned Additional Sessions Judge, and clear also from the actual four charges which have been framed in this case that the prosecution case was this, that the manufacture was for the deliberate purpose of foisting a false case on P. W. 6. There is nothing at all to suggest in this case that either the first accused or the second accused had attempted or intended to attempt to put these coins into circulation. And although some little difficulty is introduced into the case by the fact that certain coins were

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found not only in P. W. 6's shop but also in the first accused's cash box, that difficulty ought not to outweigh the fact that in the case as a whole stress was laid by the prosecution on the fact that both these coins and the others must have been recently made by the second accused, and no kind of suggestion was made that either of the accused wished at any time to put these coins into circulation.

I am therefore of opinion that what has happened in this case is that the prosecution has misconceived entirely the sections under which the accused ought to have been prosecuted. The real complaint of the Crown or of society against these accused was not that they made a number of coins to look like genuine two anna coins but that they dishonourably attempted to bring an innocent man, P. W. 6, to trouble by means of the coins which they made. They ought certainly to have been prosecuted for the real offences which on the evidence, if believed, they must have committed, namely, falsely causing criminal proceedings to be instituted against P. W. 6 under S. 211, Indian Penal Code, or fabricating false evidence against him under S. 195, Indian Penal Code. I do not know why no attempt was made to prosecute the two appellants or at any rate the first appellant under these sections. It is obvious that the appellants are not persons who are manufacturing coins with the intention of infringing the monopoly of the mint or of causing loss to the currency owning public. As I have already said more than once, there is nothing in the case to show that they intended any of these coins ever to be put into circulation. Therefore even if they could rightly have been held to be guilty under the sections under which they have been charged, their offences would in one sense of the word be only technical offences under those sections. However, I have held that the coins which were seized in this case and which are the subject-matter of the charges are not counterfeit coins because it was the clear prosecution case that the intention of the appellants in manufacturing them was merely to make use of them in order to assist them in filing a false charge.

The result is that the appellants must be found not guilty and acquitted and their bail bonds cancelled.

K. C. ——— *Accused acquitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE CORNISH.

Balabhadra Srirangam *alias* Ramakristnayya and another .. *Appellants** (*Defendants 5 and 6*)

v.

Madhyannapu Rangarao and others .. *Respondents* (*Plaintiff and Defendants 1 to 4*).

Balabhadra Srirangam *v.* Rangarao.

Guardian and ward—Suit against minor—Guardian ad litem *raising defence but not persisting in it—Decree passed* ex parte*—Suit by minor after attaining majority to have decree set aside—Allegations as to collusion and negligence on part of guardian—Burden of proof—Need for proving available defence in prior suit.*

When a person seeks to set aside a decree passed against him during his minority on the ground that his mother, who acted as his guardian *ad litem*, had colluded with the then plaintiffs and allowed the suit to proceed *ex parte*, it is the duty of the plaintiff to prove collusion and negligence set up by him. The burden is not discharged by merely showing that his mother had put forward a defence in the previous suit and did not appear to substantiate it. The defence might have been untenable or worthless, and it does not follow that merely because a guardian *ad litem* chooses to raise a defence she is bound to persist in it whether good or bad to the end. For the plaintiff to succeed in his suit he must show that he had an available defence which, if substantiated in the previous suit, would have led to a different result.

Baboo Lekraj Roy v. *Baboo Mahtab Chand*, (1871) 14 M.I.A. 393; *Parmeswari Pershad Narayan Singh* v. *Sheo Dutt Rai* and *Jhumak Singh* v. *Sheo Dutt Rai*, (1907) 6 C.L.J. 448 and *Punnayyah* v. *Viranna*, (1921) 42 M.L.J. 429: I.L.R. 45 Mad. 425, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Nellore in O.S. No. 56 of 1934.

B. Somayya for Appellants.

P. Somasundaram for Respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.:—The plaintiff's suit is a frivolous one and the learned Judge in decreeing it has disregarded certain well-settled principles of law. The plaintiff has brought this suit with a view to have it declared that the decree obtained by defendants 5 and 6 against himself and

* Appeal No. 71 of 1935. 7th April, 1937.

Balabhadra Srirangam *v.* Rangarao.

Venkatasubba Rao, J.

defendants 1 to 4 (the members of his family) in O.S. No. 21 of 1931 is not binding upon him and should be set aside. The first defendant acting for himself and his minor sons of whom the plaintiff was one, had executed in favour of defendants 5 and 6 a deed of mortgage on the 2nd July, 1926; it was to enforce this mortgage that the suit mentioned above had been brought by defendants 5 and 6. To the suit were impleaded as defendants, the plaintiff's father, the plaintiff himself and his two brothers the last mentioned three having been represented in the action by their mother as their guardian *ad litem*. During the pendency of that suit, one of the three brothers attained majority and was declared a major. In due course, on the 24th August, 1931, judgment was delivered decreeing the suit brought by the mortgagees, that is, the present defendants 5 and 6.

The plaintiff seeks to get the decree set aside on the ground that his mother, though she had filed a written statement, did not appear at the trial and allowed the suit, so far as the minors were concerned, to proceed *ex parte*. He further alleges that the decree was vitiated by collusion between the mortgagees and his mother. In a case of this sort, it is the duty of the plaintiff to prove the collusion and the negligence set up by him; the burden lay upon him of proving his allegations and that burden is not discharged by merely showing that his mother, who had put forward a defence, did not appear to substantiate it. The defence might have been untenable or worthless and it does not follow that merely because a guardian *ad litem* chooses to raise a defence, she is bound to persist in it, whether good or bad, to the end. In this respect, there is no difference whatsoever between a guardian failing to raise a defence and abandoning a defence which has been raised. If at the very outset, the guardian thinks that there is no available defence to the action, he may refrain from defending it; likewise if after filing an untenable defence, the guardian realises that the defence put forward is bad or worthless, there is nothing in law to compel him to proceed with or persist in it. These are principles of law which are well established and the learned Judge has entirely ignored them. For the plaintiff to succeed he must show that he had an available defence which, if substantiated in the previous suit, would have led to a different result, in other words as their Lordships point out in

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Baboo Lekraj Roy v. *Baboo Mahtab Chand*[1], the burden of proving that circumstances exist which vitiate the decree, is upon the plaintiff and it is an element in that proof, without which the plaintiff's case would amount to nothing that there was an available good ground of defence which the guardian failed to put forward at the hearing (p. 399). The same principle has been laid down in *Parmeswari Pershad Narayan Singh* v. *Sheo Dutt Rai* and *Jhumak Singh* v. *Sheo Dutt Rai*[2] which has since been repeatedly followed in numerous decisions. As the learned Judges observe there:

> " It is not every kind of negligence, nor any amount of negligence which would render proceedings, otherwise regular and proper, liable to be opened up; it must be such negligence, as leads to the loss of a right, which, if the suit had been conducted or resisted with due care, must have been successfully asserted".

See also *Punnayyah* v. *Viranna*[3]. The question is, has the plaintiff here established that his guardian sacrificed his interests by failing to substantiate a good ground of defence which was available to him? On this point there can be no doubt whatever that the defence first put forward and later abandoned was a thoroughly false and worthless defence.

As already stated, O. S. No. 21 of 1931 was brought to enforce a mortgage granted by the minors' father. There had been dealings extending over a long period between him on the one hand and the mortgagees on the other. There were at least three settlements of account, one in 1922, another in 1923 and the final one in 1926. If proof were needed that these settlements were *bona fide*, it is furnished by the fact that some of them were attested by the minors' maternal uncles. One defence raised in the previous suit was that these settlements were not intended to be final, but there was some kind of understanding that when the time arrived for payment, the accounts should again be looked into and examined. So far as this ground of defence is concerned, the lower Court does not even notice it, as no one appears to have treated it seriously. The suit was defended on a further ground, namely, that the debt incurred in the course of the trade referred to above, which formed the consideration for the mortgage, was

1. (1871) 14 M.I.A. 393.
2. (1907) 6 C.L.J. 448.
3. (1921) 42 M.L.J. 429: I.L.R. 45 Mad. 425.

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not binding upon the minors. In dealing with this the learned Judge has completely misdirected himself. Relying upon *Benares Bank, Ltd.* v. *Hari Narain*[1] he says that the father had no right to start a new trade, but the judge forgets that the point before him was not whether the trade was a new one or not, but whether the debt in question could or could not support the mortgage. He ignores the fundamental fact that the debt, by the date of the mortgage, had become an antecedent one and that it was not suggested (and indeed could not be) that it was either illegal or immoral. Beyond a shadow of doubt, it had become antecedent in time as well as in fact and Mr. Somasundaram, the minor's Counsel, properly enough, did not press this point before us.

It is thus clear that there was no valid defence which could have been put forward by the minor's mother in the previous suit. She raised a defence which ought never to have been put forward and the law does not require that a false or untenable defence should be persisted in. The lower Court's judgment cannot stand and is set aside. The suit is accordingly dismissed as against the 5th and 6th defendants and their appeal is allowed with costs throughout. The court-fee payable upon the plaint to the Government will be recovered from the plaintiff.

The property has been valued at Rs. 11,364-7-0 and the court-fee on the plaint will be paid upon a fifth of that sum. The advocate's fee will also be calculated upon the same amount.

B. V. V. *Appeal allowed.*

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1. (1932) 63 M.L.J. 92: L.R. 59 I.A. 300: I.L.R. 54 All. 564 (P.C.).

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD RUSSELL OF KILLOWEN, LORD MACMILLAN AND SIR JOHN WALLIS.

The Secretary of State for India in Council, represented by the Collector of Kistna .. *Appellant**

v.

Sri Raja Sobhanadri Appa Rao Bahadur Zamindar Garu .. *Respondent.*

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Secretary of State for India in Council *v.* Sobhanadri Appa Rao.

Service tenure—Karnam inam lands in permanently settled estates—Enfranchisement by Government—Lands granted to karnams free of quit-rent—Lands so granted subject to quit-rent—Whether both included in powers of enfranchisement—" Lands paying only favourable quit-rent "—Madras Permanent Settlement Regulation (XXV of 1802), S. 4—Madras Proprietary Estates Village Services Act (II of 1894), S. 17.

A zamindar of a permanently settled estate is not competent to resume lands held by a village karnam as part of their remuneration, when such lands have been enfranchised by the Government under S. 17 of the Madras Proprietary Estates Village Services Act (II of 1894).

Every inam in the original sense of that term is an alienation or assignment by the state of the land revenue of the specified land and the right to realise it. In consequence all such lands from the revenue point of view are regarded as " alienated lands ", and are so described in the preamble to the Permanent Settlement Regulation (XXV of 1802), whether or not the inam is made subject to the payment of an annual fixed payment under the name of *jodi kattubadi* or quit-rent.

The expression " continuing or abolishing " in Regulation XXV of 1802 is better suited to the other "articles of revenue" included in S. 4 of the Permanent Settlement Regulation than to the two last articles, "*lakhiraj* lands" and "lands paying only favourable quit-rents", but as applied to lands must be read as meaning continuing the tenure on which the lands were held or abolishing it by resuming the lands. The word "only" in the expression "paying only favourable quit-rents" does not have the effect of excluding from the reservation inam lands which are subject to the payment of quit-rent.

Decision of the Madras High Court reversed.

Consolidated appeals (*a*) from a judgment and 80 decrees of the High Court of Judicature, Madras (Ramesam and Madhavan Nair, JJ.) dated 5th February, 1932, as to 23 suits reversing and as to 57 suits confirming judgment and decrees of the Subordinate Judge of Bezwada dated 16th March, 1926, as to the 23 suits confirming and as to the 57 suits modifying the judgment and decrees of the District Munsif of Nuzvid at

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* P. C. Appeal No. 59 of 1935. 23rd April, 1937.

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Bezwada, dated 27th December, 1923; (*b*) from a judgment and four decrees of the High Court dated 26th January, 1932, reversing the judgment and decrees of the Subordinate Judge of Masulipatam, dated 21st December, 1935, confirming the judgment and decrees of the Principal District Munsif of Gudivada, dated 22nd September, 1924; (*c*) from a judgment and 14 decrees of the High Court dated 26th January, 1932, reversing the judgment and 14 decrees of the Subordinate Judge of Masulipatam, dated 21st December, 1925, confirming the judgment and decrees of the Principal District Munsif of Gudivada, dated 31st December, 1924.

L. De Gruyther, K.C. and *J. M. Pringle* for Appellant.—The grants of the lands in question were made before 1802 to village officers as remuneration for the discharge of public duties, and those grants were made or continued by the State as remuneration for those services. The proviso to S. 17 of Act II of 1894 has no application, as the respondents did not grant the lands and are not proprietors within the meaning of the proviso. It is not disputed that, if a zamindar grants land to a servant for personal services, he may resume occupation of the land on failure of the services. But *lakhiraj* lands, which are those granted for public services, would not be included in the grant to the zamindar. The payment of quit-rent to the zamindar does not affect the right of the Government to resume the lands in the case of public servants. The Act of 1894 was intended to apply only to persons on the Collector's Register at the time of the enactment. That appears from the definition of "proprietor" in the Act. The Act applied to post-settlement grants. Here the grants are pre-settlement grants. The wording of the proviso to S. 27 of the Act of 1894 was intended to apply also to future grants. The right of the Government to enfranchise is independent of any question relating to the amount of revenue payable by the zamindar. The lands in suit here are either held as *lakhiraj* or as lands paying only a favourable quit-rent within the meaning of S. 4 of the Regulation of 1802. When the Regulation was passed, it was intended to cover all karnam grants. Those paying no quit-rent and those paying a favourable quit-rent were on the same footing. With regard to the meaning of "only" in S. 4 of the Regulation, the reference is to lands paying favourable quit-rent as distinguished from lands paying ordinary or full quit-rent. Where tenure of land is affected by a duty to render public services, the zamindar cannot touch it. (See *Joykishen Mookerjee* v. *Collector of East Burdwan and another*[1] and *Forbes* v. *Meer Mahomed Tuquee and others*[2].)

1. (1864) 10 M.I.A. 16. 2. (1870) 13 M.I.A. 438.

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Subba Row for Respondent.—The lands in question were included at the Permanent Settlement, in the assets of the zamindari. The grants were made by the zamindars themselves. The Subordinate Judge held that most of the grants were post-settlement grants. The classes, *lakhiraj* lands and lands paying only favourable quit-rents, do not include lands held for village services. The lands in the present case are not lands paying only favourable quit-rent because they are also subject to services. Counsel refers to *Sri Raja Parthasarathi Appa Rao Bahadur Zamindar Garu* v. *Secretary of State*[1]. In *Secretary of State* v. *Raja of Venkatagiri*[2] it was held that S. 4 of the Regulation did not apply because there was a sanad in special form. When lands are granted in return for village services they are resumable by the zamindar. Counsel refers to *Secretary of State* v. *Raja of Venkatagiri*[2]. The expression "favourable quit-rent" is not confined to small quit-rents; but lands described by the High Court as paying heavy *kattubadi* would not fall under that description. If the grant was a pre-settlement grant by the zamindar, the present zamindar can resume, see *Raja Vasireddi Chandra Mouleswara Prasada* v. *Secretary of State*[3]. Enfranchisement would not deprive the zamindar of rent. A karnam in a zamindari village is a zamindari officer, and the zamindar has to maintain him. That goes to show that the karnam's inams would be included in the zamindari assets. Counsel refers to *Baij Nath Singh* v. *Sukhu Mahton*[4]. When it is not clear whether the rent is included in the assets, the grant should be construed in favour of the zamindar.

L. De Gruyther, K.C. and *Pringle*, in reply.—The High Court was justified in finding that all the lands were pre-settlement grants. The term *kattubadi* means less than full assessment, that is, a favourable assessment. The term applies to assessment of lands in this case. Counsel refers to *Kandukuri Balasurya Row* v. *Secretary of State*[5]. Where lands are granted by a zamindar for private services, he is given the right of resumption. When they are granted for public services, he cannot resume or interfere with the quit-rent. That general principle is applicable here. S. 27 (3) of Act II of 1894 is indicative of the Government's right. S. 5 of the Regulation of 1802 specifically provides that the tenure is determined by the sanad. Counsel refers to *Collector of Trichino-*

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1. (1913) 26 M.L.J. 39: I.L.R. 38 Mad. 620.
2. (1921) 41 M.L.J. 624: L.R. 48 I.A. 415 at 424: I.L.R. 44 Mad. 864 (P.C.).
3. (1935) 69 M.L.J. 123: L.R. 62 I.A. 166: I.L.R. 58 Mad. 711 (P.C.).
4. (1891) I.L.R. 18 Cal. 534 at 537.
5. (1917) 33 M.L.J. 144: L.R. 44 I.A. 166: I.L.R. 40 Mad. 886 (P.C.).

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poly v. *Lekkamani*[1], *Raja Vasireddi Chandra Mouleswara Prasada* v. *Secretary of State*[2] if read in the broadest sense does give the proprietor an absolute right to resume, but that case does not cover the exact point raised here. The questions now raised were never considered by the Board there, the case being decided on the burden of proof.

[In the course of the arguments on both sides, the following cases were also referred to:—*Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row and another*[3], *Probhat Chandra Barua* v. *King-Emperor*[4] and *Raja Venkata Narasimha Appa Row Bahadur* v. *Raja Narayya Appa Row Bahadur*[5].]

23rd April, 1937. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—The main question in all these consolidated appeals from judgments of the Madras High Court is whether the plaintiffs, who are zemindars of permanently settled estates, are entitled to resume the suit lands which had been held by village karnams or accountants as part of their remuneration and had been enfranchised by the Government under S. 17 of the Madras Proprietary Estates Village Services Act (II of 1894). From the earliest times, as stated at p. 84 of the Fifth Report, village officers and servants have received, together with other emoluments, grants of land wholly or partially exempted by Government from the payment of land revenue in lieu of wages for their services. In 1894 the Madras Government, having decided to substitute a system of payment by salaries, provided by legislation for the imposition of cesses to meet these salaries; and at the same time took power under S. 17 to enfranchise these inams in permanently settled estates, as hereinafter explained.

In 1922 the proprietors of the Telaprole and Ventrapragada estates, which are parts of the former permanently settled Nuzvid zemindary, which was partitioned in 1879, instituted a large number of suits in the Courts of the District Munsifs of Nuzvid and Gudivada, the appropriate jurisdictions, disputing the right of the Government to enfranchise the suit lands under S. 17 of Madras Act II of 1894, already mentioned, and claiming to recover possession of them under

1. (1874) L.R. 1 I.A. 282 at 305 (P.C.).
2. (1935) 69 M.L.J. 123: L.R. 62 I.A. 166: I.L.R. 58 Mad. 711 (P.C.).
3. (1913) 25 M.L.J. 386: L.R. 41 I.A. 51 (P.C.).
4. (1930) 59 M.L.J. 814: L.R. 57 I.A. 228 (P.C.).
5. (1879) L.R. 7 I.A. 38: I.L.R. 2 Mad. 128 (P.C.).

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the proviso to that section on the ground that they had been granted, either after or before the Permanent Settlement in 1802, by the plaintiffs' predecessors for village service, and that after the enfranchisement the village servants had refused to perform their services. Appeals were preferred from the decrees of the District Munsif of Nuzvid to the Subordinate Court of Bezwada which affirmed the decrees of the Court below decreeing the suits, and from the decrees of the District Munsif of Gudivada dismissing the suits to the Subordinate Court of Masulipatam which dismissed the appeals. From these decrees second appeals were taken to the High Court. In these appeals the learned Judges upheld the contention of the Government that the Government were entitled to enfranchise lands granted to village karnams free of quit-rent prior to the Permanent Settlement because they were within the reservation in respect of *lakhiraj* lands in S. 4 of the Permanent Settlement Regulation XXV of 1802, allowed the appeals, and dismissed plaintiffs' suits; but in 98 cases, where lands had been so granted subject to the payment of a *kattubadi* or quit-rent, they held that the Government had no right to enfranchise them under S. 17 already mentioned, as they were not included in the reservation, and that the plaintiffs were entitled to resume them.

From these 98 decrees of the High Court in second appeal, the Secretary of State for India in Council has preferred these consolidated appeals to His Majesty in Council after obtaining a certificate from the High Court that they were appealable under S. 109 (*c*) of the Code of Civil Procedure as involving an important question of law.

In order to see how this question arises their Lordships will refer in the first place to the terms of S. 17, and at the same time will deal with the other important question as to its construction raised by the learned counsel for the appellant. This is the first section in Chapter III of the Act which is headed "Enfranchisement of Village Service Inams." The enfranchisement of inams by the Inam Commissioner under the Inam Rules has been going on ever since the sixties of last century, and consists in releasing the lands from service and renouncing the reversionary rights of the State and confirming the inam to the grantee, his heirs and assigns, to dispose of as they might think proper subject to the payment of a quit-rent and also, in some cases, of a pecuniary payment. The Inam

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Statement on which the enfranchisement was based, and the Inam Register which records and evidences it, have often come under the consideration of the Board.

As may be gathered from the section, some village service inams in Government villages, which are by far the most numerous in the Madras Presidency, had prior to the passing of the Act been enfranchised in this way, either under the Inam Rules or other rules made in that behalf, and the section directs that enfranchisements under the Act are to be made in the same way and to be subject to the payment of quit-rent.

Before introducing the new system of remuneration into permanently settled estates, it was considered desirable to take statutory authority for enfranchising these inams with a view to avoiding possible litigation, but that object has been imperfectly attained owing to the way in which the section has been construed in the Courts below.

In construing this section and also the provisions of S. 4 of the Madras Permanent Settlement Regulation XXV of 1802, on which so much is found to turn, it is necessary to bear in mind that every inam in the original sense of that term is an alienation or assignment by the State of the land revenue of the specified land and the right to realise it. In consequence, all such lands from the revenue point of view are regarded as "alienated lands", and are so described in the preamble to the Permanent Settlement Regulation XXV of 1802, whether or not the inam is made subject to the payment of an annual fixed payment under the name of *jodi kattubadi* or quit-rent. Where no quit-rent is reserved, the lands are *lakhiraj* in the sense of being totally exempt from land revenue. Where a quit-rent is reserved, these are only partially exempt because the inamdar has to pay the Government part of the land revenue in the shape of a quit-rent. There is in their Lordships' opinion no apparent reason why the power of enfranchisement should have been conferred in the one case and withheld in the other, but that is the effect of the judgments now under appeal.

S. 17 is as follows:—

If the remuneration of a village-office consists in whole or in part of lands, or assignments of revenue payable in respect of lands, granted or continued in respect of or annexed to such village-office by the State, the Government may enfranchise the said lands from the condition of service by the imposition of quit-rent under the rules for the time being in force in respect of the enfranchisement of village-service inams in villages not per-

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manently settled or under such rules as the Government may lay down in this behalf; such enfranchisement shall take effect from such date as the Government may notify:

Provided that the said enfranchisement shall be applicable to all lands or assignments as aforesaid even though, at the time this Act comes into force, they may not be devoted to the purpose for which they were originally granted;

and provided, further, that any lands or emoluments derived from lands which may have been granted by the proprietor for the remuneration of village service and which are still so held or enjoyed may be resumed by the grantor or his representative.

Under the terms of the section, enfranchisement is authorised where the remuneration of the village service consists of lands "granted or continued in respect of or annexed to such village office by the State," or when it consists of assignments of revenue payable in respect of lands so "granted or continued." As in all these cases the village servants, as part of their remuneration, had been assigned the revenues payable in respect of the lands forming part of their remuneration as well as the lands themselves, and, as such assignments can only have been made by the State, it might appear that all such assignments of revenue must have been made and continued by the State within the meaning of the section, and that it empowered the Government to enfranchise.

It is, however, unnecessary to decide this question as no such case was set up. The Government's case was that the lands "had been continued by the State" within the meaning of the section, as they were not in a position to set up that the lands had been granted by the State, because, as observed by the Board in *Vasireddi Chandra Mouleswara Prasada* v. *Secretary of State*[1] "in the case of an ancient grant made before 1802 it is well nigh impossible, in the absence of the document granting the property, to discover with any reasonable certainty the date and other particulars of its origin".

To prove the "continuance" of the lands, which is the case set up here, the Government contend that all these village service lands, whether or not subject to a payment of *kattubadi* or quit-rent, are excluded from the Permanent Settlement by S. 4 of Regulation XXV of 1802, which reserves to Government full power of *"continuing or abolishing* them," the lands not subject to quit-rent being *lakhiraj* lands, and the lands subject to the payment of quit-rent falling within the

1. (1935) 69 M.L.J. 123: L.R. 62 I.A. 166 at 173: I.L.R. 58 Mad. 711 (P.C.)

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description of "all other lands paying only favourable quit-rents" within the meaning of the section.

The expression "continuing or abolishing" is better suited to the other "articles of revenue" included in S. 4 of the Permanent Settlement Regulation than to the two last articles, "*lakhiraj* lands," and "lands paying only favourable quit-rents," but, as applied to lands, must in their Lordships' opinion be read as meaning continuing the tenure on which the lands were held or abolising it by resuming the lands. Their Lordships are also of opinion that the word "continued" must have the same meaning in S. 17 of the present Act. The framers of the section must have contemplated that continuance would be proved, as it has been in these cases, by reference to the provisions of S. 4 of the Permanent Settlement Regulation, and indeed most probably took the word "continued" from that section, so that, assuming lands paying only favourable quit-rents to be included in the reservation in S. 4 of the Regulation, their Lordships are of opinion that continuance by the State has been proved in these cases. Whether they are so excluded from the permanent settlement is the important question in respect of which the certificate has been granted, and their Lordships will give their reasons later for holding that they are excluded.

The learned Judges no doubt took the same view of the meaning of the word "continued" in affirming the right to enfranchise in cases where no *kattubadi* had been reserved, but those judgments are not included in the record, as they are not the subject of these appeals; and Ramesam, J., had already ruled to the same effect in the extract from his judgment set out at page 167 of the report in *Vasireddi's* case (*supra*).

Assuming that S. 17 of the Act of 1894 confers authority to enfranchise on the ground that the lands were continued by the State, the next question is what is the effect of the second proviso which has been often construed as entitling the proprietors of estates to resume lands granted for village service by their predecessors prior to the Permanent Settlement, although the body of the section apparently authorises their enfranchisement. That was the construction on which the Board proceeded in the case just mentioned, and it had not been challenged in the argument before the Board on behalf of the Secretary of State who was the respondent in that appeal.

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It has, however, been explained by Mr. Pringle, who was counsel for the defendant in that case and this, that the objection was to have been taken if the Board had not intimated that the appellant zamindar had failed to prove that the suit lands had been granted by one of his predecessors, and it is quite clear that the Board did not adjudicate upon it. Counsel for the appellant have now raised the contention that reading the proviso, as it must be read, in the light of the definitions of "proprietor" and "estate" in S. 4 of the Act of 1894, the right of resumption by a proprietor is limited in the case of permanently settled estates to grants made by a proprietor of the estate after the Permanent Settlement, that is in this case after December, 1802:—

" 'Proprietor' means any person in whose name any *estate* is for the time being registered in the office of the collector of the district wherein the *estate* is situated. . . . . ."

The definition of "estate," so far as it is applicable to this case is as follows:—

" 'Estate ' means—

(*a*) any permanently-settled estate, whether a Zemindari, Jaghir, mitta or palaiyam."

Their Lordships have no doubt that this construction of the proviso gives effect to the intention of the legislature. The elaborate provisions in the body of the section, on a careful examination, prove to have been specially framed to obviate the necessity of raising the question by whom these ancient grants were made, as already explained. On the other hand, grants made subsequently to the Permanent Settlement by proprietors, who under that settlement are also assignees of the land revenue are not made by the State, and it is to such grants only that the proviso applies. It is unfortunate that these grants by the zemindar are often spoken of as post-settlement inams, when they are not inams at all as they are not assignments by the State of its land revenue, but are made by persons to whom the State has already assigned the land revenue.

It only remains to deal with the ruling which has been certified by the High Court as involving an important question of law. That question is stated with great precision by Ramesam, J., in one of the judgments under appeal which is printed at page 140 of the record:—

" In the case of both these inams the Subordinate Judge found that the inams are subject to the payment of *kattubadi*. This raises a new question

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of law. If at the time of the permanent settlement they were subject to *kattubadi* payable to the Zamindar, the Zamindar then representing the Government, the lands cannot be said to be *lakhiraj*. The only question therefore is whether they would come under the second heading in S. 4 of the Regulation. Can they be regarded as lands paying only a small quit-rent? What is the effect of the word 'only'? The contention for the Zamindar is that the lands must be subject to one burden only, namely, the payment of light quit-rent. If they are subject to an additional burden, namely, rendering of services, they are subject to two burdens, namely, payment of quit-rent and rendering of services; and such inams do not fall under S. 4 of the Regulation and cannot be regarded as excluded from the assets of the Zamindari. The meaning of the word 'only' was considered by Sankaran Nair, J., in *Sri Raja Parthasarathi Appa Rao Bahadur* v. *Secretary of State*[1]. His view is that if the land is subject to two burdens, whatever the nature of the services might be, the land cannot be regarded as excluded from the assets. Tyabji, J., expresses a slightly different view at page 628. He thought that if the lands were burdened with services due to the Government, they must be regarded as excluded. We prefer to follow Sankaran Nair, J.'s view and hold that the suit inams cannot be regarded as excluded from the Zamindari."

On reference to the report all that Sankaran Nair, J., is found to have said on the subject is that the provision in S. 4 of Regulation XXV of 1802 as to all other lands paying only favourable quit-rents "obviously does not include lands which are held on condition of paying quit-rent, and *also* on condition of rendering certain services in addition to that rent." Such lands, as Ramesam, J., puts it, are thus subject to two burdens, and therefore all service inams which are subject to the payment are not lands "subject only to the payment of favourable quit-rents," and do not come within the reservation in S. 4 of Regulation XXV of 1802. Now in the first place, in their Lordships' opinion, it is a fallacy to speak of the imposition of quit-rent in this case as a burden. The karnam in lieu of wages is granted the land, together with an assignment by the State of the land revenues of the land subject to the payment of a quit-rent, that is to say, he is not granted a total but only a partial exemption from the land revenue on the land. Far from being a burden this assignment so limited is part of his remuneration. Secondly it appears to be inadmissible, when the legislature has in the preamble expressed its intention to exclude all alienated land from the Permanent Settlement, to hold that it has sufficiently manifested its intention, by the use in a badly drafted section of the words "paying only favourable quit-rents," to exclude

1. (1913) 26 M.L.J. 39: I.L.R. 38 Mad. 620 at 625.

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from the reservation for no apparent reason the very large class of service inams which are subject to the payment of quit-rent, especially as due effect may otherwise be given to the use of the word "only." The drafting of this section has not escaped criticism, and is so very inferior to the drafting of the rest of the Regulation as to suggest that this section, which combines the provisions of sections 35 and 36 of the Bengal Permanent Settlement Regulation VIII of 1793, was substituted at a later stage for the original draft. The Madras Government had been directed to follow the necessary modification with the terms of the Bengal Permanent Settlement, and as will be seen there were good reasons for thinking that S. 36 of that Regulation required some modification in Madras.

S. 4 is in the following terms, the articles of revenue not now in question being omitted:

" The Government having reserved to itself the entire exercise of its discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included, according to the custom and practice of the country, under the several heads . . . . of *lakhiraj* lands (or lands exempt from the payment of public revenue), and of all other lands paying only favourable quit-rents—the permanent assessment of the land-tax shall be made exclusively of the said articles now recited."

The corresponding S. 36 of the Bengal Regulation is as follows:—

" The assessment is to be fixed independent and exclusive of all *lakhirjah* lands, whether exempted or not from the *khiraj* (or public revenue) with or without due authority."

In Madras all alienations of land revenue take the form of inams with or without reservation of quit-rent. In these circumstances the framers of the Madras section decided, perhaps not very happily, to retain the use of the word *lakhiraj* for lands without any reservation of quit-rent and so totally exempt from land revenue, and to provide under another "article" for "all other lands paying only a favourable quit-rent," and so only partially exempt from land revenue.

If the Bengal Regulation had been reproduced, it might have been contended that lands paying quit-rents were not *lakhiraj*, not being totally but only partially exempt from land revenue; and it would appear to have been thought desirable to provide expressly that the reservation extended to lands which, though not wholly exempt from land revenue, paid only favourable quit-rents instead of paying the full revenue. As regards the expression "favourable quit-rents," the word

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inam means favour, and any quit-rent falling substantially short of the full assessment is a favourable quit-rent. This, in their Lordships' opinion, is a sufficient explanation of the use of the word "only," which for reasons already given could not receive the construction put upon it for the first time in construing the Act of 1894 now under consideration in the absence of any other possible explanation. Their Lordships are also unable to accept the further contention of the learned counsel for the respondents that the special provisions of the Bengal Regulation as to chakran lands, or lands granted in lieu of wages, can be read into S. 4 of the Madras Regulation, and they have not been shown any sufficient reason for differing from the findings of the High Court, but in all these appeals the inams were pre-settlement grants not so governed by this ruling.

Their Lordships will therefore humbly advise His Majesty that the appeals of the Secretary of State in all these cases be allowed and the decrees of the High Court and of the lower Courts in favour of the respondents be set aside, and the suits dismissed. The respondents will pay the appellant's costs throughout.

Solicitors for Appellant: *The Solicitor, India Office.*

Solicitors for Respondent: *Hy. S. L. Polak & Co.*

R. C. C. — *Appeals allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO, MR. JUSTICE CORNISH AND MR. JUSTICE VENKATARAMANA RAO.

Vadlamannati Venkatanarayana Rao .. *Appellant* (Petitioner—2nd Decree-holder)*

v.

Gottumukkula Venkata Somaraju .. *Respondent (2nd Respondent).*

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Hindu Law—Joint family—Representation by father in suit—Decree for possession and mesne profits—Partition entered into pending suit—Death of father after passing of decree—Decree whether can be executed against coparcenary property in hands of son—Civil Procedure Code (V of 1908), Ss. 50

* A. A. O. No. 433 of 1936. 3rd March, 1937.

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and 53—Applicability—Interpretation of Statutes—History of amending provision—Relevancy.

The suit property was purchased by the fifth defendant for and on behalf of his joint family, which at that time consisted besides him of defendants 6 and 7 his then undivided sons by his first wife. It was on the date of the acquisition subject to a mortgage and subsequent to the purchase the mortgagee brought a suit to enforce the mortgage. The fifth defendant who was impleaded therein represented his family and there was a decree for sale. The mortgagee himself purchased the property in execution and instituted the present suit to recover possession of the property and mesne profits thereof. The plaintiff impleaded not only the fifth defendant but also his sons, defendants 6 and 7, and the suit culminated in a decree for possession and mesne profits. The fifth defendant having died subsequent to the passing of the decree the plaintiff applied for execution praying that the respondent, who was another son of the fifth defendant and who was not impleaded in the suit, might be brought on record as legal representative and that the decree for mesne profits might be executed against the coparcenary property in his hands. The respondent contested the plaintiff's right to proceed against his share of the property and relied on a partition entered into before the passing of the decree between his father and himself. It was found that the partition set up was a genuine transaction.

Held, that the fifth defendant was sued as representing the joint family of which he was the manager, that the partition entered into during the pendency of the suit did not in any way modify the rights of the parties, and that consequently the coparcenary property in the hands of the respondent was liable to be taken in execution of the decree for mesne profits passed in the case.

Daulat Ram v. *Mehr Chand*, (1887) L.R. 14 I.A. 187: I.L.R. 15 C. 70 (P.C.); *Sheo Shankar Ram* v. *Jaddo Kunwar*, (1914) L.R. 41 I.A. 216: I.L.R. 36 A. 383 (P.C.); *Kishan Prashad* v. *Har Narain Singh*, (1911) 21 M.L.J. 378: L.R. 38 I.A. 45: I.L.R. 33 All. 272 (P.C.) and *Lingangowda* v. *Basangowda*, (1927) 52 M.L.J. 472: L.R. 54 I.A. 122: I.L.R. 51 Bom. 450 (P.C.), relied on.

Held, further, by *Cornish, J.* (the other Judges not expressing an opinion on the point) that the liability under the decree was enforceable against the coparcenary property in the hands of the son by virtue of S. 53 of the Civil Procedure Code, and it did not matter for that purpose whether it was incurred by the father in his capacity as manager or personally.

Per *Cornish, J.*—The state of the law previous to an amendment may be considered in the interpretation of an amending enactment and it is permissible to use this knowledge for ascertaining the remedy or alteration which the legislature intended. But it is not a rule of construction that the language of an amending or new provision is to be limited to the particular matter intended to be altered if, in the ordinary and natural sense of the words employed the enactment is capable of a wider application.

Appeal against the order of the Court of the Subordinate Judge of Narasapur dated 2nd July, 1936 and made in E. A. No. 124 of 1936 in E. P. No. 24 of 1936 in O. S. No. 7 of 1922.

N. Sivaramakrishna Aiyar for Appellant.

P. Satyanarayana Rao and *S. Venugopal Rao* for Respondent.

The Court delivered the following

JUDGMENTS: *Venkatasubba Rao, J.*—This appeal has been brought against an order made by the lower Court, refusing execution against the respondent. The decree that was sought to be executed was one passed in O. S. No. 7 of 1922 *inter alia* against the respondent's father, who was the 5th defendant in the suit. Into the chequered history of that suit, it is unnecessary to enter; it is sufficient to state for the present purpose, that the suit itself was commenced in 1919 (it was originally numbered as O.S. No. 96 of 1919), that a decree for possession was passed against the 5th defendant in May, 1933, that in execution of that decree the plaintiff obtained possession of the lands in October of the same year and that by a further judgment delivered on 3rd April, 1935, mesne profits were awarded against the fifth defendant, who subsequently died in the following June. (To avoid confusion, it may be stated that the formal decree drawn up in respect of mesne profits bears a later date, namely, 22nd July, 1935, but that is a circumstance which is immaterial). The plaintiff-appellant applied for execution in February, 1936, praying first, that the respondent (that is, the fifth defendant's undivided son) might be brought on the record as his legal representative and secondly, that the decree for mesne profits might be executed against the coparcenary property in his hands. The respondent contested the plaintiff's right, relying upon a partition said to have been entered into on 1st February, 1931, between his father and himself. The facts alleged by him are these. Under the partition the lands in dispute along with certain other items of coparcenary property were allotted to the father who two days later settled these properties upon his wife (the respondent's mother) by a deed of gift dated 3rd February, 1931. He contended that in those circumstances the decree passed against his father could not be executed against the joint family property which fell to his share. This contention the lower Court upheld, finding as a fact that the partition set up was a genuine transaction. The plaintiff, who has filed this appeal, impeaches the correctness of the learned Subordinate Judge's order.

It may be convenient to set out here a few more facts connected with O. S. No. 7 of 1922. Along with the fifth defendant, his two adult sons were impleaded as defendants 6

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and 7, but the respondent himself was not joined, he being then an infant. Those two sons put forward an oral partition alleged to have been entered into between themselves and their father in 1912. They asserted that they were not in possession of any of the items claimed, as the entire lands in dispute had been allotted to their father. Their contention was accepted and they were exonerated. So far as the plaintiff's claim to mesne profits was concerned, as the decree awarded profits only from 1916 onwards, defendants 6 and 7 were held not liable, apparently on the ground that the mesne profits decreed were in respect of a period subsequent to the partition. (*See* the order embodying the finding at page 172 and the judgment of Ramesam, J., at p. 153 of the Privy Council Pleadings Book). Pausing here for a moment, the fact that emerges from this brief narrative is, that the fifth defendant was sued as representing the family in respect of his joint family property. In fact the addition of the 6th and 7th defendants makes no difference as the claim against the fifth defendant was in essence one made against him as representing his branch of the family. The view that prevailed in the suit was, that the 6th and 7th defendants possessed no interest in the joint family property and should therefore be regarded as having been unnecessarily impleaded. The following passage bearing on this point from the order embodying the finding, may in this connection be quoted:

"Coming now to the fifth to seventh defendants, they form one group. The fifth defendant is the father and the sixth and seventh defendants are his sons by his first wife. The fifth defendant has another son by his 2nd wife and they two are living together as members of a joint family. The contention of these defendants is that the lands in suit so far as they are admitted to have been in possession of the fifth defendant are in his sole possession and that sixth and seventh defendants were not in possession of them in any of the years under enquiry. Division between the father and the sons in the year 1912 has been set up. Though the partition deed has not been produced, evidence of subsequent acts of the parties dealing separately with their respective shares has been adduced. . . The oral evidence on the defendant's side supports the contention of these defendants".

Although several questions have been argued, I conceive that the real point to decide is, did the fifth defendant represent in the action, his son the respondent, who was then a minor, although he was not described as a party? For deciding this question, a reference to the pleadings becomes necessary. The fifth defendant, in the written statement filed by him, describes the lands in question as those in possession of his family and

refers to the position of defendants 6 and 7 in the following terms:

"All these items of property fell to the share of the fifth defendant in the partition of the property of the family of defendants 5, 6 and 7. Defendants 6 and 7 have no concern in this suit". (Paragraph 7.)

The present suit O. S. No. 7 of 1922 is itself the sequel of an earlier suit O. S. No. 65 of 1908, the facts of which also show that the fifth defendant was sued as representing his family. That was a mortgage suit filed by the plaintiff and certain others who had a subsisting mortgage right, *inter alia*, over the lands in question, in the possession of the fifth defendant. The family of the fifth defendant had acquired these properties under a purchase effected by his father, which shows that they were ancestral properties in the hands of defendants 5, 6 and 7. The purchase by the fifth defendant's father, it may be mentioned, was subject to the mortgage sued on in the earlier action. In due course, a mortgage decree was passed against the mortgagor and various other persons including defendants 5 to 7, and, the properties were in execution of the decree brought to sale and purchased by the mortgagees themselves. It was to recover possession of the lands so purchased that the present suit O. S. No. 7 of 1922 was filed. Among the persons who contested the suit, was the fifth defendant who pleaded that it was barred by S. 47, Civil Procedure Code, but eventually, as already observed, a decree was passed in favour of the plaintiff. I have narrated these facts at some length, with a view to show that the fifth defendant was sued as representing his family and that it was in that capacity that he defended the action. The respondent describes himself as being 26 years old in an affidavit filed by him on the 2nd January, 1937, that is to say, during the greater part of the time the suit (O. S. No. 7 of 1922) was going on, he was a minor. He became a major about 1929 but still continued to be represented by his father in the suit. Granting that in the absence of the partition of 1931, he would be bound by the decree passed against his father and that it could be executed against the coparcenary property in his possession (a point which I shall presently consider), the question arises, does the fact of the partition make any difference? I think the theory of representation must imply that the respondent, though not *eo nomine* on the record, should be treated as though he himself were a party to the suit. If this be so, it follows in

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my opinion that unless he has done something which has had the effect of removing him from the record, he must be treated as continuing to be a party till the date of the decree. At any rate, on the facts of this case it is impossible to come to a different conclusion. The lower Court's decree was passed in 1925 and it was, while an appeal from that decree was pending in this Court, that the partition now put forward of 1931 was entered into. Is it to be imagined that the respondent could at his will abruptly put an end to the representation which had gone on for about 12 years, producing by his act the strange legal result of his not being bound by the decree to be passed shortly thereafter? I think the answer to this question must be in the negative.

The decision of this case must in my opinion really turn on the question whether a managing member can effectively represent the entire joint family in a suit by or against him and secondly, on the still more important question, whether the decree should show on its face that the claim was made by or against the manager in his representative character. On neither point it seems to me much doubt can be entertained in view of certain Privy Council decisions. In *Daulat Ram* v. *Mehr Chand*[1] the facts were these. The plaintiff, being a mortgagee and purchaser at an execution sale of the mortgaged property, sued the defendants for a declaration that his purchase included their share of the mortgaged property, and was not limited to the shares of the mortgagors who, as the managing members of the joint family to which the defendants belonged, had purported to mortgage the interests of the entire family. This case established two principles: first, that the managing member could effectively represent the entire family and that a decree passed against him would be binding upon all the members and secondly, that it is not necessary that it should be stated in the pleadings in express terms that he is sued or is being sued as such manager; the suit will be deemed to have been brought by or against him in his representative character if the circumstances of the case show that he is the manager of the family and the property involved is the family property. In the plaint in that suit, the mortgagee claimed not only to

1. (1887) L.R. 14 I.A. 187: I.L.R. 15 Cal. 70 (P.C.).

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recover against the mortgagors the amount of the mortgage-debt and interest, but asked that he might have execution and be satisfied out of the mortgaged property. Similarly, in his application for execution, he asked, not that he might be allowed merely to seize the right, title and interest of the mortgagors, but that he might be permitted to seize and sell the entire property that had been mortgaged. That the decree (which by the way was not produced before their Lordships) did not contain the words that the mortgagors were sued in their representative character, is perfectly obvious. From the provisions of the mortgage-deed their Lordships came to the conclusion that what was intended to be mortgaged was the whole of the mortgaged property and not the mortgagor's share alone. Relying upon the facts adverted to above, they held that the circumstances of the case showed that the suit was brought against the managers in their representative character. There is yet another principle, though not material to the present purpose, which this case establishes. The suit, as already stated, was brought by the mortgagee-purchaser and their Lordships observed that the defendants had the opportunity of having the questions tried *in that suit*, first, whether in fact there was a debt due and secondly, whether the mortgage was a valid mortgage which bound the ancestral property (pp. 192 and 197). Without raising those questions, the defendants rested their defence on the ground that they had not been made parties to the suit and consequently their share in the property had not been sold and could not be sold under the execution (p. 195). The result was that the decree was held to be binding upon them, although they had not been made parties to the action. This theory of representation was pushed further in *Sheo Shankar Ram* v. *Jaddo Kunwar*[1]. There was a mortgage suit in which a foreclosure decree was passed against the managing members of a joint Hindu family. They did not avail themselves of their right to redeem, so that the order absolute was pronounced against them. The other members of the family then brought a suit claiming that they were entitled to redeem the mortgaged properties. Their claim was negatived. The importance of this decision lies in the fact that the mortgagee never had noticed of the fact that the properties had been

1. (1914) L.R. 41 I.A. 216: I.L.R. 36 All. 383 (P.C.).

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acquired by the mortgagors on behalf of their joint family (p. 219). That shows that neither were the mortgagors described in the plaint as the managers of the family nor was the decree passed against them in their representative character. But from the circumstances of the case it appeared that the joint family was effectively represented. It may be worth noting what those circumstances are:

"They (the mortgagors) were at the time of acquiring the properties and also at all material times in the foreclosure suits the managers of the joint family and they acted as such both in acquiring the properties and in abstaining from redeeming them."

In coming to the conclusion that the mortgagors effectively represented the entire family, their Lordships refer to the findings of the Courts in India (p. 220). In the passage quoted above, I regard the statement that the mortgagors acted as managers even in abstaining from redeeming the properties as most significant. This case shows beyond a shadow of doubt that a decree which does not on its face show that it was passed against the coparcenary, would yet be binding upon the whole family. *Lingangowda* v. *Basangowda*[1] gives effect to the same principle. That case referred to certain lands and it was there held that a previous decree which negatived the right of the managing member would on the ground of *res judicata* be binding upon the junior members of the coparcenary. Their Lordships observe that in such cases the Court looks to Explanation VI of S. 11, Civil Procedure Code, 1908, to see:

"Whether or not the leading member of the family has been acting either on behalf of the minors in their interests or, if they are majors, with the assent of the majors".

Then on the facts they came to the conclusion that the plaintiff in the previous suit was acting on behalf of himself and his minor children. It may be mentioned that there was the finding of the Subordinate Judge in the case that the managing member had conducted the previous suit with due care—which amounts to saying, in the words of Explanation VI referred to above, that the parties litigated in respect of the right claimed, *bona fide* in the former action. The three decisions of the Privy Council to which I have referred, relate to immovable property, but the principle of representation applies alike to other transactions as well. In *Kishen Parshad*

1. (1927) 52 M.L.J. 472: L.R. 54 I.A. 122: I.L.R. 51 Bom. 450 (P.C.).

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v. *Har Narain Singh*[1] the suit was brought in respect of a loan and the question that was raised was one of limitation. The action was originally brought by the managing members of the family and it was held that the joinder of the other members as co-plaintiffs after the expiry of the statutory period did not prevent the suit as originally constituted from being in time. It became necessary to determine whether the members newly added were necessary parties and their Lordships held they were not. In the course of their judgment they refer to the two decisions of the Madras High Court. The first case, *K.P.K. Pisharody* v. *V.M.N. Somayajipad*[2] turned on co-ownership of land. Turner, C.J., held that all the owners in such a case must be joined and they could not invest the managers with the right to sue in a representative capacity. Their Lordships say that this proposition, thus broadly stated as to co-ownership, cannot be applied to the managing members of an undivided Hindu family. Then referring to *Alagappa Chetti* v. *Vellian Chetti*[3] their Lordships observe that the proposition there laid down to the effect that a manager cannot sue without joining all those interested with him, if literally construed, goes too far. The decision of the Judicial Committee cited above renders obsolete *Viraraghavamma* v. *Samudrala*[4] and *Guruvappa* v. *Thimma*[5]. I have refrained from quoting in support of my view the Indian decisions on the point, but to one decision I may refer, where the question has been exhaustively considered by Tekchand, J., in *Jai Kishen* v. *Ram Chand*[6].

Lastly the question remains, does the fact that subsequent to the suit there was a partition, make any difference? The reason for holding that the members not joined should be held liable is, that they are substantially parties to the suit through the manager, in other words, they are sufficiently represented, though not *eo nomine* parties on the record. It follows from this, that the decree can be executed not only against the parties whose names appear but also against those who must be deemed to be constructive parties. In this view it is immaterial whether the family continues to remain joint or became

1. (1911) 21 M.L.J. 378: L.R. 38 I.A. 45: I.L.R. 33 All. 272 (P.C.).
2. (1881) I.L.R. 3 Mad. 234.
3. (1894) 4 M.L.J. 283: I.L.R. 18 Mad. 33.
4. (1885) I.L.R. 8 Mad. 208.
5. (1887) I.L.R. 10 Mad. 316.
6. A.I.R. 1935 Lah. 1.

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divided. As Mayne observes:

"All the members of the family, and therefore all their property, divided or undivided, will be liable for debts which have been contracted on behalf of the family by one who was authorised to contract them". (Mayne's Hindu Law, 9th Edn., S. 333.)

In this case the partition was, as already stated, entered into prior to the decree (though long after the commencement of the suit) but that circumstance, as I have held above, makes no difference.

I have dealt with the case on the footing that the fifth defendant was sued as representing the joint family of which he was the manager; but in addition to being the managing member, he happens to be the father of the respondent. Both the counsel therefore argued the case mainly on the assumption that the decree passed against the father was in respect of his personal debt, which the respondent as his son, was under a pious obligation to discharge. There is a legal duty cast upon the son as upon any other junior coparcener, to discharge a liability incurred by the father, in his capacity of manager, for family purposes, and it is therefore unnecessary on the facts here to invoke the doctrine of pious obligation. However, as stated above, it was argued that a decree passed against the father alone, though prior to the partition and necessarily therefore in respect of a pre-partition debt, cannot be executed subsequent to the partition, against the coparcenary property, in the hands of the son. As to the soundness of the position, although it is supported by some authority, I entertain considerable doubt and wish to reserve my opinion upon it for the present. It is then contended—that is, the next step in the argument—that this position necessarily leads to the result that S. 53, Civil Procedure Code, is inapplicable where before the father's death the son had become divided. With this view again I am not prepared to agree at present, but on this point also I wish to make no final pronouncement.

In the result, the appeal is allowed with costs both here and in the Court below.

Cornish, J.

Cornish, J.—If the debt is regarded as a joint family debt I agree with my learned brother's judgment. But I think that the same conclusion can be supported upon the view that the decree debt was personal to the fifth defendant.

The appellant who had an unsatisfied decree against the fifth defendant, has sought to execute that decree after the

judgment-debtor's death against the present respondent as his legal representative. He was, therefore, bound to have recourse to S. 50 of the Code for that purpose. That is the effect of the Full Bench ruling in *Kanchamalai Pathar* v. *Shahaji Rajah Sahib*[1]. The liability of the legal representative in respect of such unsatisfied decree is by S. 50 limited to the extent of the property of the deceased judgment-debtor which has come into his hands and has not been duly disposed of by him. That is the sole measure of a legal representative's liability for the debts of the deceased. The share of ancestral property which a son takes in a partition with his father ceases to be property in which the father has any right or proprietorship. Such share becomes the separate property of the son as against his father. But it has been decided by the Full Bench in *Subramania Aiyar* v, *Sabapathi Aiyar*[2] that the liability of the son under Hindu law for a debt incurred by his father continues notwithstanding a later partition between them. The creditor can enforce that liability against the son. The share, however, which a son has taken in a partition with the father is certainly not property of the father which after his death forms part of the father's estate in the hands of the son.

But then comes the special provision of S. 53, which says that, for the purpose of S. 50, property in the hands of a son, which is liable under Hindu law for the payment of a debt of the deceased ancestor, in respect of which a decree has been passed, shall be deemed to be the property of the deceased which has come to the hands of the son as his legal representative. A fiction is introduced. As Mr. Justice Cave observed in *Queen* v. *Norfolk*[3]:

"When you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing".

Apart from S. 53, a Hindu son could not be made liable in execution as his father's legal representative in respect of property which was not property in which the father had any right or title at the time of his death. The language of the section seems to me sufficiently wide to include a liability

1. (1935) 70 M.L.J. 162: I.L.R. 59 Mad. 461 (F.B.).
2. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).
3. (1891) 60 L.J.Q.B. 379.

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incurred by the father which is enforceable against property in the hands of his son, whether the liability was incurred by the father in his capacity of manager or personally. In both cases it is the Hindu law which attaches to the property this liability.

In *Atul Krishna Roy* v. *Lala Nandanji*[1] the view taken by one of the learned Judges, Agarwalla, J., is that S. 53 is intended only to deal with the case of a joint Hindu family and to have no application to a separated Hindu family. As a matter of history it is known that the section was introduced to set at rest a question upon which there had been a divergence of opinion in the courts concerning the right of a decree-holder to execute the decree after his judgment-debtor's death against ancestral property which had passed by survivorship to the judgment-debtor's son. The state of the law previous to an amendment may be considered in the interpretation of the amending enactment, and it is permissible to use this knowledge for the purpose of ascertaining the remedy or alteration which the legislature intended. But it is not a rule of construction that the language of an amending or new provision is to be limited to the particular matter intended to be altered if, in the ordinary and natural sense of the words employed, the enactment is capable of a wider application.

I think that S. 53 covers a case, such as the present, where there is a decree against the father, in respect of a pre-partition debt binding on the share of property allotted to the son in the partition. In such circumstances, for the purpose of S. 50, the son is to be deemed to be the legal representative of his deceased father in respect of the share taken in the partition by the son. This is no hardship to the son. It is merely a matter of procedure how the creditor shall enforce his right of making him liable for the father's debt. It has been held that in the execution proceedings, though the fact of the debt is not open to dispute, the character of the debt and its bearing upon the son's obligation to pay are matters which can be challenged as questions arising in the execution. Further, under S. 47 (3) the son can raise the question whether he is a legal representative for the purpose of S. 50. And if the debt is shown to be of such a character that the son is relieved of his obligation, the condition required by S. 53 to his being fixed with the liability of a legal representative will be wanting.

1. (1935) I.L.R. 14 Pat. 732 (F.B.).

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On the question whether the debt in the present case was a debt incurred by the father prior to the partition, I am content to accept what my brother Venkatasubba Rao, J., has stated in *Muthammal* v. *Sivakami Ammal*[1] that the word in the texts which is translated 'debt' has a wider significance than a present obligation to pay a liquidated sum of money, which is the ordinary meaning of the word. It would include a liability for mesne profits incurred by the father before partition, although the actual liability was not determined in a suit until after the partition. It will be a pre-partition debt in the sense in which the word 'debt' is used in the texts.

For these reasons I think the Civil Miscellaneous Appeal should succeed.

Venkataramana Rao, J.

Venkataramana Rao, J.—I agree that this appeal should be allowed. The facts are fully stated in the judgment of my learned brother Venkatasubba Rao, J., and it is unnecessary to re-state them. I shall content myself with stating a few facts which are necessary for the disposal of the point on which I seek to rest my decision.

At all material times in this litigation the fifth defendant and his son the respondent in this appeal were members of an undivided Hindu family. The property to which the present claim relates was purchased by the fifth defendant for and on behalf of the joint family which at that time consisted of the fifth defendant and defendants 6 and 7, his then undivided sons by the first wife. It was on the date of the acquisition subject to a mortgage. Subsequent to the purchase the mortgagee brought a suit to enforce the mortgage impleading the fifth defendant as a purchaser of the equity of redemption. The fifth defendant represented his family in that litigation. There was a decree for sale and in execution of the decree the mortgagee purchased the property and the present suit has been instituted based on that purchase to recover possession of the property and for mesne profits in respect thereof. The plaintiffs impleaded not only the fifth defendant but also his sons the sixth and seventh defendants. On the plea raised by defendants 6 and 7 that they ceased to have any interest in the suit properties by virtue of a partition effected in the family in and by which the suit properties fell to the share of the fifth defendant, they were exonerated from the

1. (1925) M.W.N. 371.

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suit. At the said partition the fifth defendant obtained the said properties for himself and his son, the present respondent, who continued to be members of an undivided Hindu family. On the 21st December, 1925, the suit was dismissed and there was an appeal against the said decree to the High Court. The High Court pronounced judgment on 3rd May, 1933, decreeing possession to the plaintiffs and directing the ascertainment of mesne profits, and a decree for mesne profits was ultimately passed on 3rd April, 1935. Two months later the fifth defendant died and in February, 1936, the present application was filed to recover the amount by sale of the properties in the hands of the present respondent. It was resisted by him on the ground that during the pendency of the appeal there was a partition between him and his father in and by which the suit properties fell to the share of the father and by reason of the said partition the properties in his hands could not be rendered liable in execution on the basis of a decree obtained against his father alone. The lower Court gave effect to his contention.

It is contended in appeal that by virtue of S. 53, Civil Procedure Code, the present respondent can be rendered liable in execution of a decree against the father in spite of the partition. It seems to me unnecessary to go into this question on the facts of this particular case. A father in a joint Hindu family, apart from certain rights which he gets by virtue of his position as a father in Hindu law, is also the head and manager of the joint family. As pointed out by their Lordships of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh*[1] "the father is in all cases naturally and in the case of infant sons necessarily the manager of the joint family estate." By virtue of such position as manager, the father has got the power to represent the family in all transactions relating to the family. He can sue and be sued as representative of his family. That a manager can represent the family in litigation has never been doubted and has been laid down, as pointed out in *Kuttayan* v. *Mammanna Ravuthan*[2] from the earliest times by the Privy Council. Where the suit relates to a joint family property and the person sued is either the father or the eldest member, the accredited head of the family, it must be presumed that he

1. (1879) L.R. 6 I.A. 88: I.L.R. 5 Cal. 148 at 165 (P.C.).
2. (1911) I.L.R. 35 Mad. 681.

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was sued as representing his family and he need not be described as such in the pleadings, nor should the decree be specifically passed against him as such. In *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*[1] one Mosahab was sued as the heir of his grandfather Nath Dass for recovery of about Rs. 39,000 on account of the rents of a certain Mouzah Ramnugger and it is stated that Nath Dass had taken a lease of that from 1847-1854, and a decree was passed to be recoverable from the property left by the deceased Nath Dass. In execution of the said decree, Mouzah Muddunpore which belonged to the joint family was sold. In the suit Chooman, an undivided brother of Mosahab, was not joined. The question arose as to the validity of the execution sale and how far it is binding on both the brothers or either of them. Their Lordships of the Judicial Committee held the sale to be valid and binding against both, and observed thus:

> "Acting on the principle which follows from their finding that this family was joint, it must be assumed that Mosahab Dass is sued as a representative of the family and that it must further be assumed that Nath Dass in taking the lease of the Mouzah here referred to, Ramnugger, in respect of which the rent was due must be assumed to have taken it on behalf of the family, and that the debt must be deemed to be a debt from the family...... Looking to the substance of the case, this decree is a decree against the representative of the family, in respect of a family debt and that it is one which could be properly executed against the joint property of the family, and that Muddunpore was a part of that joint property".

This decision clearly lays down that where a decree has been obtained against the manager as representative of the joint family in respect of a joint family liability it will be binding on his undivided brothers and the entire joint family property can be taken in execution though the undivided brother was not made a party to the suit. This principle would *a fortiori* apply to the case of a father and son. I think it is unnecessary to refer to the other Privy Council decisions as they have been already dealt with at length by my learned brother Venkatasubba Rao, J., in his judgment. Therefore, where a father or other manager is sued as a representative of a family, the other members of the family must be held to be substantially parties to the suit through such manager. The fact that they are not parties *eo nomine* will not render them any the less parties to the suit. It was, on this principle, held

1. (1879) L.R. 6 I.A. 233: 5 C.L.R. 477 (P.C.).

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that where a manager dies during the pendency of the suit or after decree, the person who succeeds him as manager can be brought on the record and the other members of the family need not be made parties. A judgment against a person sued in a representative character is a judgment against every individual member covered by the representation and therefore the bar of *res judicata* is held to apply to a member of a family not party *eo nomine* to a litigation represented by its manager. (Vide *Lingangowda* v. *Basangowda*[1].) Once the liability is declared a family liability, every item of the joint family property is bound to satisfy that liability; the question of division or non-division hardly arises. The principle of Hindu Law is that members who are united at the time of a joint family liability is incurred, are not absolved from their liability by the fact that they became subsequently divided. (Vide *Chelamayya* v. *Varadayya*[2].) So far as a creditor is concerned, he is entitled to have recourse to every item of the joint family property so long as it is in the hands of the persons who are under the law liable for his debt. When they must be held to be parties to the suit, it is immaterial what the character of the property in their hands is, whether it is still undivided property or has become separate property by division. In this case, at the time of the acquisition, at the time of the first partition, at the date of the institution of the suit, and at the date of the institution of the appeal, the fifth defendant was sued as a representative of his family and he effectively represented the family and thus the present respondent. The question is, did that representation cease by virtue of the partition before the date of the decree in the High Court. The suit having been properly constituted, any severance of status between several members of the family would not divest the representative character of the manager therein till the other members choose to disaffirm it; he was entitled to carry on the litigation for and on behalf of the respondent and can be held accountable in respect thereof. The estate of a person dying during the pendency of a suit was held to be fully represented by one of his several heirs brought on the record in his place, but only for that purpose;

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1. (1927) 52 M.L.J. 472: L.R. 54 I.A. 122: I.L.R. 51 Bom. 450 (P.C.).
2. (1898) 9 M.L.J. 3: I.L.R. 22 Mad. 166 at 170, 171.

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much more so in respect of a transaction concerning the joint family, the manager who is empowered by law to represent the other members who are interested therein must be deemed to continue to represent them till the transaction is completed as until then the joint interest in the transaction cannot be said to have ceased. But in this case it seems to me it would not lie in the mouth of the present respondent to deny the representative character of his father. At the date of the partition he must be deemed to have been quite aware of the pending litigation and when the suit property was assigned to the share of the father he must be deemed to have also been clothed with the necessary power to defend the appeal in regard thereto. If the present respondent thought that his father should not be allowed to represent him, it was his duty to have come on the record. Having failed to do so, he is precluded from now asserting that the fifth defendant no longer represented him. Therefore the property in the hands of the present respondent is liable to be taken in execution of the decree for mesne profits passed in this case. In this view it seems to me the argument based on S. 53, Civil Procedure Code, does not arise. I may add that I also share the doubts entertained by my learned brother Venkatasubba Rao, J., in regard to the correctness of the decisions which take the view that in respect of a decree obtained prior to partition against a father alone execution cannot be levied subsequent thereto against the coparcenary property in the hands of the son.

I agree in the order proposed by my learned brother Venkatasubba Rao, J.

B. V. V. — *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD MACMILLAN, SIR SHADI LAL AND SIR GEORGE RANKIN.

Aya Ram and another .. *Appellants**

v.

Rup Chand, since deceased, and others .. *Respondents.*

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Aya Ram v. Rup Chand.

Deed—Construction—Village land—Shamilat—Deed conveying land "together with external and internal rights"—Shamilat not yet divided at date

* P. C. Appeal No. 101 of 1934. 10th June, 1937.

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of deed—Whether deed effective to convey right to shamilat together with land.

A vendor sold certain land to a vendee under a deed of sale which contained the following term:—"From to-day the said vendee shall enjoy possession of the land sold together with the external and internal rights for ever. The said vendee will enjoy possession of the land sold together with the external and internal rights for ever. In future I (that is, the vendor) have been left no concern or connection with the aforesaid land sold". On the date of the sale no division had been effected of the shamilat or village common land to be allotted to that land. The vendee's successors in title claimed to be entitled by virtue of the deed to the shamilat to be allotted to the land sold but the successors in title of the vendor disputed that claim.

Held, that the wording of the deed clearly showed an intention on the part of the vendor to convey to the vendee not only the land itself but also all rights and interests which he possessed in association with it, including the vendor's right of participation in the shamilat; and the words "external rights" were appropriate to include a right in respect of the land sold, such as a right to participate in the ultimate partition of the shamilat.

Kalu Khan v. *Umda*, 47 P.R. 1916 and *Shahamad* v. *Ibrahim*, 57 P.R. 1915, approved.

Decision of the Lahore High Court affirmed.

Appeal (No. 101 of 1934) from a judgment and decree dated 19th January, 1933, of the High Court of Judicature, Lahore, (Coldstream and Jai Lall, JJ.) setting aside a judgment and decree dated 24th November, 1928, of the Senior Subordinate Judge, Mianwali.

J. P. Eddy, K. C. and *V. K. Krishna Menon* for Appellants.

L. De Gruyther, K.C. and *J. M. Parikh* for Respondents.

10th June, 1937. Their Lordships' judgment was delivered by

Lord Macmillan.

LORD MACMILLAN.—This suit is concerned with the right to the shamilat or village common land "which will be allotted by partition to 207 kanals of proprietary land, being one-third share of Samoranwala well", situated in the village of Harnauli in the Mianwali district of the Punjab. Rup Chand the original plaintiff, was the owner of these 207 kanals, and claimed a declaration that he was entitled to the share of shamilat land in question: he has since died, and the present respondents 1 (*a*), (*b*), (*c*) and (*d*), as his legal representatives, have taken his place as plaintiffs in the action.

Rup Chand's title to the 207 kanals was derived from one, Nur Muhammad, who in 1851 sold the property to Parsa Ram. On the 4th August, 1885, Parsa Ram sold the property to Nota Ram by a registered deed, specifying the fields by their

numbers in the revenue records and giving the boundaries of the area, the southern boundary being described as "the area of the shamilat of the village". After stating that the vendor had "now made an absolute sale of the land measuring two hundred and seven kanals together with a share in the well and well gear" the deed of sale contains the following material passage:—

"The agreement is that from to-day's date the said vendee will enjoy possession of the land sold together with the external and internal rights for ever. In future I have been left no concern or connection with the aforesaid land sold. The two thatched houses together with the four walls situate at the well which are owned by me shall also be considered as the property of the vendee. But I myself will remove the malba (materials) *i.e.*, timber".

Twenty-one years later, on the 4th October, 1906, Nota Ram and his brother Kota Ram sold the property to Mehnga Ram, the father of Rup Chand, the original plaintiff, by deed of sale which described the subjects sold as "the entire land measuring 207 kanals owned by us together with one-third share in the well, well gear, etc., accessories of the well and a share in the shamilat pertaining to the land. . . . That is to say, the area of the shamilat land which will be apportioned to the aforesaid land will be taken by the vendee".

There were originally 1,028 defendants to the suit, consisting of (1) descendants of Parsa Ram, (2) their alienees, and (3) the whole proprietors of the village. By an order of the Court, seven of the defendants were appointed to defend the suit on behalf of all, but some 19 pages of the printed book before their Lordships are nevertheless quite unnecessarily occupied with the names and designations of all the original defendants. The members of the proprietary body of the village admitted the plaintiffs' claim, but it was contested by the descendants of Parsa Ram and their alienees, who are represented before their Lordships by the present appellants, Aya Ram and Jiwan Singh. They resist the claim of the plaintiffs on the short ground that by the deed of sale of the 4th August, 1885, Parsa Ram did not convey to the plaintiffs' author Nota Ram the share of shamilat land appertaining to the 207 kanals of land sold, but that Parsa Ram retained the right to that share, which, they say, has now passed to them.

The Senior Subordinate Judge of Mianwali dismissed the suit, holding that no right to a share in the shamilat was con-

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veyed to the vendee by the deed of sale of the 4th August, 1885. On appeal, the High Court of Judicature at Lahore reversed this decision and granted decree in favour of the plaintiffs. It is now for their Lordships to determine which of those views should prevail.

It appears that the land which is now the shamilat or common land of the village of Harnauli was formerly part of the thal or waste belonging to the Crown and on which the villagers enjoyed the privilege of grazing their cattle. In the Gazetteer of the Bannu District, compiled by Mr. Thorburn in 1883-84, and published under the authority of the Punjab Government, it is stated that, in 1856-57, boundaries were laid down in the thal, and a large portion was allotted to the village of Harnauli, but no change was made in the existing grazing rules, and apparently no proprietary rights in the land were created or conferred. Then, in 1878, at the first "Regular Settlement the whole question was taken up, a liberal area of grazing land attached to each village as its separate property and the remainder marked off as Government rakhs" (reserves). But while in 1878 the village community of Harnauli thus acquired right to a large tract of land as their shamilat, no specific appropriation of areas within that tract was made to the individual landholders in the village, and the shamilat was held in common. Subsequently, a process of division was begun, and, in an extract from the wajib-ul-arz or village administration papers of Harnauli, undated, but said to be of about 1920, it is stated that the "entire shamilat land of this village is under partition". In the plaint it is said that the share of the shamilat which on a proportionate basis will fall to the 207 kanals of village land belonging to the plaintiffs will be 3,496 kanals.

It would thus appear that, at the date of the deed of sale by Parsa Ram to Nota Ram, namely, the 4th August, 1885, which is the material date for the present purpose, no division of the shamilat had been effected. It was only as the common land acquired increasing value through the development of irrigation that interest awakened in the question of separate rights of property in it.

In a previous litigation an attempt to dissociate the right to a share in the shamilat from the plaintiffs' present property

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of 207 kanals failed. On that occasion the claimants were representatives of Nur Mohammad who sold the property to Parsa Ram in 1851 and they sought to make out that Nur Mohammad did not then part with his right to share in the shamilat. The claim failed on the ground that in 1851 the village proprietors had no proprietary rights in the shamilat, and consequently that, at that date, Nur Mohammad could neither sell nor reserve any such right.

It only remains to mention that the 207 kanals constituted the only property which Parsa Ram in 1885 owned in the village of Harnauli; that after the sale he resided in another village twenty miles away and took no further concern with the land which he had sold or any rights connected with it; and that, although there were two settlements and revisions of records subsequent to 1885, Parsa Ram's heirs and successors displayed no interest in them.

For the appellants it was argued (1) that the onus of proving that a sale of village land carried with it the right to a share of the shamilat lay on the vendee; (2) that the right to a share of shamilat land was not a mere accessory which passed with the village property to which it was attached; (3) that the subject of sale in the deed of 1885 consisted expressly of the 207 kanals alone; and (4) that there were no general words of conveyance apt to carry the right to a share of the shamilat.

Their Lordships recognise that for the first two of these submissions there is a considerable body of authority (cf. *Rahman* v. *Sai*[1]), although there is much to be said for the view that the right of a village landowner to have a share of the shamilat apportioned to his holding is a right inherent in his ownership of his holding which might well be held to pass with it. Their Lordships, however, do not find it necessary to discuss this question for they find in the extract which they have quoted from the deed of sale of 1885 words which, in their opinion, clearly show on the part of the vendor an intention to convey to the vendee, not only the 207 kanals, but also all rights and interests which he possessed in association with the 207 kanals, including the right to a share in the shamilat. The sale is not only of the 207 kanals, but also of "the

1. (1928) I.L.R. 9 Lah. 501.

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external and internal rights for ever", and the vendor declares that in future he is to have "no concern or connection with the aforesaid land sold". There could be no more emphatic words of divestiture, and the suggestion that the vendor who used them nevertheless intended to reserve to himself a right to claim an as yet unascertained share of the shamilat, which right belonged to him only as the owner of the 207 kanals, appears to their Lordships untenable. The words "external rights" are quite appropriate to include a right in respect of the 207 kanals to participate in the ultimate partition of the shamilat. In the case of *Kalu Khan* v. *Umda*[1], the deed of sale in question contained the words "*jumla haquq-o-murafiq hai dakhli wa kharji,*" which their Lordships are advised have a similar signification, and these words were in that case held to carry a share of the shamilat.

The circumstances that the holding which was sold constituted the vendor's whole property in the village and that he subsequently quitted the village and showed no more interest in his former property—circumstances which also characterise the present case—were regarded as important indications of the vendor's intention in *Shahamad* v. *Ibrahim*[2], in which the deed of sale, although silent as to the vendor's share of the shamilat, was held to have effectually carried it. In their Lordships' opinion, regard may be had to such considerations in construing the unsophisticated conveyancing of which the deed before them is an example, and to which it would be unreasonable to apply the rigid canons of interpretation appropriate to the finished products of Lincoln's Inn.

Their Lordships are accordingly of opinion that the deed of sale of 1885 was effectual to convey, and did convey, the vendor's right of participation in the shamilat, and they will humbly advise His Majesty that the appeal should be dismissed and the decree of the High Court of Judicature at Lahore of the 19th January, 1933, be affirmed. The appellants will pay the costs of those respondents who appeared.

Solicitors for Appellants: *Nehra & Co.*

Solicitors for Respondents: *T. L. Wilson & Co.*

R.C.C. —— *Appeal dismissed.*

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1. 47 P.R. 1916.
2. 57 P.R. 1915.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

T. Varadarajulu Naidu and Kuppuswami Naidu & Co., by its partners .. *Petitioners** (*Plaintiffs*)

v.

R. Rajamanika Mudaliar and others .. *Respondents* (*Defendants*).

Varadarajulu Naidu and Kuppuswami Naidu & Co. *v.* Rajamanika Mudaliar.

Indian Partnership Act (IX of 1932), S. 69 (2)—Suit by an unregistered firm—Firm registered pending suit—Effect of—Suit to be deemed as filed on date of registration—Court may take notice of subsequent registration.

Where a suit was instituted by a firm for recovery of debt due to it at a time when the firm was unregistered and subsequently during the pendency of the suit the firm was registered, the Court can, in order to do substantial justice to the parties, take notice of the subsequent fact of registration and treat the suit as validly instituted on the date of registration.

Ramakrishna Nadar v. *Ponnayya Thirumalai Vandaya Thevar*, (1935) 69 M.L.J. 791, followed.

Subramania Mudaliar v. *The East Asiatic Co., Ltd.*, (1936) 71 M.L.J. 663, doubted and distinguished.

Petition under S. 25 of Act IX of 1889, praying the High Court to revise the decree of the Court of the Subordinate Judge of Chingleput dated 21st December, 1934, and passed in S. C. S. No. 719 of 1933.

K. Rajah Aiyar for Petitioners.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners (partners in a firm) brought S. C. S. No. 719 of 1933 in the Court of the Subordinate Judge of Chingleput for the sum of Rs. 509-12-4, due to them by the respondents debtors. They brought their suit on 30th October, 1933, when the firm was unregistered. This apparently escaped the notice of the office of the Subordinate Judge and also of the defendants. This deficiency was however rectified by the plaintiffs in July, 1934. The defendants filed their written statement on 15th December, 1933, making no reference to the fact that the suit had been instituted without registration of the partnership. The suit was posted for hearing on 20th December, 1934, more than a year after the filing

* C. R. P. No. 510 of 1935. 9th March, 1937.

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of the written statement; and on the previous day, that is, on the 19th December, 1934, the defendants applied to be allowed to raise a preliminary objection to the maintainability of the suit. They contended that the suit having been filed before the partnership was registered under S. 69 (2) of the Partnership Act, no suit could be instituted and that the suit not having been properly instituted should be dismissed. The learned Subordinate Judge upheld this objection and dismissed the suit. The petitioners have brought this petition, contending not that the suit was properly instituted, but that it should be deemed to have been properly instituted on the date that the partnership was registered.

S. 69 (2) of the Partnership Act runs thus:—

> "No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the register of firms as partners in the firm."

This means, as rightly contended by Mr. T. M. Krishnaswami Aiyar for the respondent, that on the 30th October, 1933, the plaint filed in Court was not a plaint at all and no valid suit was pending before the Subordinate Judge; and that even after the registration in July, 1934, nothing was done to the plaint by the plaintiffs to transform it from an invalid plaint into a valid one. His argument therefore is that the plaint continued as before to be an invalid one and that the mere fact of registration did not amount to an institution of the suit; so that at no time was there any valid institution of the suit. One cannot deny that this argument is logically correct; but the question is rather whether the Court, in order to do substantial justice to the parties without violating the principles of the Partnership Act, cannot deem the suit to have been instituted on the date of registration. It is well-established principle that the Court can take notice of events that happen subsequent to the filing of the suit and that any irregularities or deficiencies in the cause of action that may exist on the date of the filing of the plaint can be overlooked if on some date subsequent to the filing of the plaint and before the suit comes up for trial those irregularities or deficiencies are rectified by the plaintiff or by process of law. In *Doraisami Pillai* v. *Chinnia Goundan*[1], the

1. (1917) 34 M.L.J. 258.

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plaintiff, when he saw the written statement, became aware of the deficiencies in his title and perfected it by obtaining a conveyance from the next reversioner; and this act of the plaintiff was recognised by the Court. In *Subbaraya Chetty* v. *Nachiar Ammal*[1] a mortgage suit was premature, because on a proper interpretation of the bond it was seen that the money was not due. The date of maturity was some date after the filing of the suit and that date was prior to the hearing of the suit. It was held that the suit should not have been dismissed because when the suit came on for trial the cause of action came into being. In C.R.P. No. 1489 of 1935, an illegal transfer by an insolvent was recognised by the Court, because of the fact that the adjudication was subsequently annulled. In *Appalasuri* v. *Kannamma Nayuralu*[2] a certain event happened after the filing of the suit which strengthened the plaintiff's title. He was allowed to amend the plaint, setting forth the additional cause of action. There, the principle governing the action of Courts in these matters was said to be that multiplicity of proceedings should be avoided. In all these cases, as in the present case, if the Courts had applied the wording of the statutes literally they would have dealt with the plaints as they existed when the suits were filed and proceeded to dispose of the suits on the pleadings raised. The plaintiff would then have been entitled immediately to have brought a fresh suit on the new cause of action. Courts are naturally reluctant to dismiss a suit and cause loss to the plaintiff when the plaintiff has a cause of action for a similar suit which he could file at once.

I agree with Mr. Krishnaswami Aiyar that the case of the plaintiffs is not as strong as in the cases just quoted; for S. 69 (2) of the Partnership Act embodies a principle of public policy intended to penalise partnerships which do not register. However, when the registration has been carried out the requirements of the legislature are fulfilled and there is no reason in equity why from the moment of registration a suit previously filed should not be allowed to go on. This suit is not of course one in which the subsequent act of registration validates the plaint from the date of its being filed; for no suit was maintainable before the date of registration. The most that the plaintiff can ask for is that his plaint should be treated

1. (1917) 7 L.W. 403. 2. (1925) 49 M.L.J. 479.

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as a valid one from the date of registration. A very similar case was considered by a Bench of this Court in *Ramakrishna Nadar* v. *Ponnayya Thirumalai Vandaya Thevar*[1]. There a person applied for leave to sue *in forma pauperis*, and his petition was dismissed. Under O. 33, r. 15, Civil Procedure Code, a pauper is allowed to file a suit if he has paid the costs of the Government and of the respondents awarded in his application to sue *in forma pauperis*. The actual wording of the section is:

"An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper".

The wording of this section makes it quite clear that the paying of costs of the Government and the opposite party is a condition precedent to the institution of the suit, just as it is in S. 69 (2) of the Partnership Act. Varadachariar and Pandrang Row, JJ., in *Ramakrishna Nadar* v. *Ponnayya Thirumalai Vandaya Thevar*[1] distinguished certain Allahabad decisions as instances where the condition had never been fulfilled from the case before them where the condition was fulfilled after the institution of the suit. The learned Judges then say:

"We do not think the Court below need have dismissed the suit altogether. It is unnecessary to go through the formality of a dismissal and a re-institution the next moment after payment of the costs ordered in O. P. No. 8 of 1931. We think it will be sufficient to say that the suit must be treated as one instituted on the 2nd of March, 1932 (the date of fulfilment of the condition) and dealt with on that basis".

The case that came before Menon, J., *Subramania Mudaliar* v. *The East Asiatic Co., Ltd.*[2], was very similar to the present one except that in that case the plaintiff had applied to the Court for an amendment of the plaint, which application was dismissed; and it was because of that difference from the present case and from *Ramakrishna Nadar* v. *Ponnayya Thirumalai Vandaya Thevar*[1] that the learned Judge refused to interfere in revision. It would therefore appear that Menon, J., was not inclined to interfere in a matter of this kind in revision. I do not think that he intended to go further

1. (1935) 69 M.L.J. 791. 2. (1936) 71 M.L.J. 663.

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and to hold that if the Court had allowed the suit to continue —if the cause of action was not barred by limitation on the date of registration—it would have been wrong. If he did, I would respectfully dissent. I see no difference in the effect of the words quoted above in O. 33, r. 15 and the material words in S. 69 (2) of the Partnership Act. The difference in the actual words used in the two sections was necessary because in O. 33, r. 15, the legislature wished to point out that the dismissal of an application to sue *in forma pauperis* did not preclude the applicant from instituting a suit upon payment of court-fee. The section had therefore to be so framed as to bring out the fact that the applicant was at liberty to bring a suit provided that the condition of previously paying the costs of the Government and the other party was fulfilled. There was no need to frame S. 69 (2) of the Partnership Act in that way. The right of a partnership to sue was assumed; but the legislature wished to deprive a partnership which had not been registered of that right. Hence the form of the words:

"No suit to enforce a right........shall be instituted.......".

I therefore hold, on the analogy of *Ramakrishna Nadar* v. *Ponnayya Thirumalai Vandaya Thevar*[1] that the Court should have permitted the plaintiffs to go on with their suit.

The question still remains whether this Court should interfere in revision or, as Menon, J., did in *Subramania Mudaliar* v. *The East Asiatic Co., Ltd.*[2], should refuse to interfere with the discretion of the Court. In deciding this point I have been influenced by the fact that if the office of the Subordinate Judge had done its duty properly this difficulty would never have arisen. When a suit is filed by a partnership, it is the duty of the office to see that the plaint is a proper one and that the suit is maintainable. It is for that reason that if the facts set out show that the suit is premature or that no suit lies, the plaintiff is called upon in the ordinary course to point out how the suit is maintainable. If the office had been alert, it certainly would have called upon the plaintiffs to state whether the partnership had been registered and if so when. If that had been done, the plaint would have been returned, the firm would have been registered, and a fresh plaint (which would have been the old plaint with the fact of registration and the date added) presented. The defendants did not raise

1. (1935) 69 M.L.J. 791. 2. (1936) 71 M.L.J. 663.

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any objection in their written statement or until a year had elapsed after the filing of the written statement. I therefore think it would be most inequitable for the plaintiffs to have their suit dismissed and be forced to file another after paying fresh court-fee. The duty of the Court is to administer justice according to the principles of equity and good conscience and it cannot be said to do this when it dismisses a suit because the formality of withdrawing a plaint and filing a fresh one in the same terms was not complied with. I am satisfied therefore that the interests of justice require that this petition should be allowed and the suit remanded for fresh disposal. It is ordered accordingly. The suit will be deemed to have been instituted on the date of the registration. Under the circumstances of the case there will be no order as to costs in this Court. The costs in the lower Court will of course abide the result of the suit.

S. V. V. —— *Petition allowed and suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Mohideen Bi .. *Petitioner* (Petitioner)*

v.

Bashu Sahib .. *Respondent (Criminal Petitioner).*

Mohideen Bi *v.* Bashu Sahib.

Criminal Procedure Code (V of 1898), S. 488—Claim of maintenance by a wife of a Muhammadan for herself and her children—Unreasonable refusal by wife to live with her husband—Dismissal of her application improper—Children should have been granted maintenance.

Where a Muhammadan wife claimed maintenance for herself and her children and it was found by the Magistrate who heard her that her husband was making a *bona fide* offer to maintain them in his own house which his wife, the petitioner, unreasonably refused, and on the application having been dismissed,

Held, that the Magistrate should have awarded maintenance to the children, who could not be separated from their mother, their legal guardian.

In re *Parathy Valappil Moideen*, (1913) 25 M.L.J. 355 and *Allah Rakhi* v. *Karam Ilahi*, A.I.R. 1933 Lah. 969, relied on.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Special Honorary Presidency Magistrate, George Town, Madras, of the Court of the Presidency

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* Crl. R. C. No. 916 of 1936. (Crl. R. P. No. 828 of 1936). 25th March, 1937.

Magistrate, Madras, dated 17th September, 1936, and made in M. P. No. 224 of 1936.

Mohideen Bi v. Bashu Sahib.

T. R. Ramachandran for Petitioner.

V. Rajagopalachari for Respondent.

K. V. Ramaseshan for *The Crown Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—In this case, maintenance was claimed by a Muhammadan wife for herself and her children. It was found by the learned Magistrate that the respondent made a *bona fide* offer to maintain them in his own house, which petitioner, his wife, unreasonably refused to accept. Her application was accordingly dismissed. In revision it is argued that the Magistrate should have awarded maintenance to the children, whose legal guardian their mother is, and who cannot therefore be taken separately to live with her father. In support of this argument, I have been referred to In re *Parathy Valappil Moideen*[1] and *Allah Rakhi* v. *Karam Ilahi*[2] and no authority has been cited to the contrary.

The petition will accordingly be sent back to the Magistrate with a direction to enquire what is the proper rate of maintenance for the children, and to award them maintenance at that rate.

K. C. —— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

S. M. A. M. S. Meyyappa Chettiar .. *Appellant* (Petitioner—3rd party proposed 4th Defendant)*

v.

Seethai Achi and others .. *Respondents (Respondents 1 to 4, Plaintiff and Defendants 1 to 3).*

Meyyappa Chettiar v. Seethai Achi.

Civil Procedure Code (V of 1908) O. 1, r. 10 and O. 22, r. 10—'Interest' in O. 22, r. 10, meaning and nature of—' Questions involved in the suit' in O. 1, r. 10—If only between parties or also between stranger and parties—Compromise of suit if question involved in the suit—Compromise between parties

1. (1913) 25 M.L.J. 355. 2. A.I.R. 1933 Lah. 969.
* C. M. A. No. 261 of 1934. 2nd September, 1936.

Meyyappa Chettiar v. Seethai Achi.

and stranger—Stranger applying to be added as a party and enforce compromise—Compromise disputed by the parties—If stranger can be added as a party—Proper remedy of stranger to file a suit to enforce the compromise.

One *M R* died in 1928 leaving behind him his widow (plaintiff) two brothers *A* and *R* (the 1st and third defendants), *M* (a son by a predeceased brother *S*) and *N* the adopted son of the first defendant *A*. The parties had become divided in 1924 by arbitration. The widow brought a suit in 1930 against *A*, *R* and *N* for an account of the management by *A* and *R* of her husband's estate, etc. This suit was brought with the aid of *M* who agreed to finance her to the extent of Rs. 20,000. During the course of the suit a compromise deed (Ex. A) was alleged to have been executed and a petition (Ex. B) and an affidavit in support thereof to enable *M* to be impleaded as a party to the suit. The said *M* thereupon filed two petitions to add him as the fourth defendant to the suit and to record the compromise. The applications were opposed by both the plaintiff and defendants 1 and 3. Pending disposal of the petitions the plaintiff made an adoption and applied to withdraw the suit. It was the case of *M* that it was one of the terms of the compromise that he should be added as the fourth defendant in the suit so that he may be bound by and participate in the family arrangement and compromise and that he should get a third share in the estate which the plaintiff surrendered in favour of defendants 1 and 3 as the immediate reversioners to her husband's estate.

Held, that *M* could not be added either under O. 22, r. 10 or under O. 1, r. 10, Civil Procedure Code. ' Interest ' in O. 22, r. 10 means ' interest in the subject-matter of the litigation ' and it must be an *interest in presenti* vested in the applicant on the date of the application to implead him as a party to the suit and not merely contingent. There was here no transfer of any interest in favour of *M* but only an agreement to transfer.

As for O. 1, r. 10, Civil Procedure Code, the presence of a party must be felt by the Court to be necessary to enable it to effectually and completely adjudicate upon and settle *all the questions involved* in the suit. The questions need not be only as between the parties to the suit but they may be even as between the parties and a stranger as regards the subject-matter of the suit or any portion thereof. The question whether a suit has been terminated by a valid compromise may be a question involved in the suit as held in *Appasami Nayakan* v. *Varadachari*, (1896) I.L.R. 19 Mad. 419, but even then the mere addition of *M* here would not enable the Court to effectually and completely adjudicate upon the question as to compromise, because the compromise itself is impeached on one ground or other by either party to the suit and none of the parties seeks to enforce it and there is the further fact that the plaintiff has made an adoption before the compromise has been made a decree of Court. It will not therefore be a proper exercise of discretion to add him as a party to this suit. The proper remedy will be a suit to declare the compromise binding on all the parties to this suit with the adopted son also added as a party thereto.

Appeal against the order of the Court of the Subordinate Judge of Devakottai dated 19th April, 1934, and made in I.A. No. 673 of 1931 in O. S. No. 56 of 1930.

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[A short summary of the facts necessary to follow the portion of the judgment reported is taken from the judgment and given here. Other portions of the judgment are omitted as not necessary for this report.]

There were four brothers who formed a joint family, namely, Soliappa, Arunachala (first defendant in O. S. No. 56 of 1930), Muthu Veerappa and Ramasami, the third defendant in the said suit. Soliappa died in about 1908 leaving two sons Meyyappa and Natesa *alias* Ramaswami (the second defendant). The said Natesa *alias* Ramaswami was adopted by the first defendant. In or about 1924 the parties became divided with the aid of arbitrators. An arrangement appears to have been entered into at that time that having regard to the incapacity of Muthu Veerappa the properties and moneys that fell or would fall to the share of Muthu Veerappa should be taken care of and managed by defendants 1 and 3, and in pursuance of the said arrangement they did really undertake that duty and been in possession of the said properties and monies. The said Muthu Veerappa died on 6th January, 1928, and on the 8th January, 1928, a document came into existence from which it is evident that the management was continued by defendants 1 to 3. The document provides that an arrangement should be made for an adoption to the said Muthu Veerappa. It also purports to cut off the widow with a sum of Rs. 31,000 for her maintenance. The plaintiff was apparently dissatisfied with the treatment accorded to her by defendants 1 and 3 and misunderstandings arose. There were already misunderstandings between Meyyappa and defendants 1 and 3. The plaintiff was contemplating a litigation against defendants 1 and 3. Meyyappa took this opportunity and offered financial assistance to her to the extent of Rs. 20,000. With his aid she filed this suit O. S. No. 56 of 1930 in or about April, 1930. Attempts at settlement of the litigations between the parties were set on foot in or about March, 1931. On 16th April, 1931, there was a meeting of the parties in the house of Rajah Sir Annamalai in Kanadukathan and on that day the defendants, Meyyappa's Vakil Lakshminarayana Iyer O. A. P. Arunachalam Chetty, and the Rajah were all present; on that date certain documents came into existence, a deed of compromise Ex. A in the case and a petition Ex. B and an affidavit in support thereof to enable the appellant to be made a party to the

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suit. The said compromise and the petition were signed by Meyyappa and also by defendants 1 and 3 and their signatures appear to have been attested on the said date. The plaintiff's thumb impression was taken on the 17th. The papers were all with the Rajah till 20th January, 1931, when by his direction the papers were handed over to Meyyappa. Thereupon he filed two petitions, I.A. No. 673 of 1931 to make him a party and I.A. No. 674 of 1931 to pass a decree in terms of the compromise. The applications were opposed both by the plaintiff and defendants 1 and 3 but on different grounds. On 9th February, 1933, when yet the petitions were pending, having gone thrice to the High Court by then, the plaintiff adopted the son of the third defendant to her husband and on the 13th, that is, four days later, filed an application for the withdrawal of the suit. This was opposed by Meyyappa. The Subordinate Judge Mr. Parthasarathy Iyengar was of opinion that in view of the fact that I.A. Nos. 673 and 674 were pending, he could not permit the plaintiff to withdraw the suit before they were disposed off. Against this order C. R. P. No. 328 of 1933 was filed, the judgment in which is reported in *Seethai Achi* v. *Meyyappa Chetti*[1]. When the matter went back to the Sub-Court, the next Subordinate Judge Mr. Krishnamachariar took up the petitions on 18th April, 1934, and declined to make Meyyappa a party to the suit holding on the merits against him, as also on the grounds (1) that he could not be the assignee within the meaning of O. 22, r. 10; (2) that having regard to the subsequent adoption and the adverse attitude of the defendants he would exercise his discretion in not making him a party to the suit. Against this order, he preferred this Civil Miscellaneous Appeal. His Lordship Mr. Justice Venkataramana Rao after discussing in detail the previous history of the petitions and the embarrassment caused by the several orders of this Court at the previous stages, held that the procedure adopted by the last Subordinate Judge was not quite correct and that as a consequence the parties were misled somewhat and relevant evidence was not let in and observed that he should have been disposed to remand this matter for necessary evidence being taken had it not been for the fact that he was not allowing the party petition on other grounds.

S. Srinivasa Aiyangar, S. Parthasarathi and *V. K.*

1. (1934) 66 M.L.J. 517 : I.L.R. 57 Mad. 892.

Meyyappa Chettiar *v.* Seethai Achi.

Thiruvenkatachariar for Appellant.

Nugent Grant, K. S. Krishnaswami Aiyangar, T. M. Krishnaswami Aiyar, V. Rajagopala Aiyar, T. V. Ramiah, K.S. Desikan and *S. Venkatesa Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—Apart from any question as to the truth or validity of the compromise, the question is whether the appellant fulfils the requisites required under O. 22, r. 10 in order to enable the Court to implead him as a party to the suit. Has there been an assignment, creation or devolution of interest within the meaning of r. 10? 'Interest' means interest in the subject-matter of the litigation. The words "has come or devolved" connote an interest *in praesenti.* It must be vested in the applicant on the date of the application to implead him as a party to the suit and not merely contingent. On a careful reading of the compromise I am of opinion that there was no transfer of any interest in favour of the appellant in the estate which was the subject-matter of the said suit and compromise. So far as defendants 1 and 3 are concerned, it may be that the deed was intended to operate as a present surrender of the estate and a consequent vesting thereof in defendants 1 and 3. But so far as the appellant is concerned, it is only an agreement to convey one-third of the estate which was vested in them. No doubt under cl. 8 in regard to the properties which were allotted to the plaintiff there was a contingent interest created in favour of the appellant. But in my opinion that would not be enough to enable the plaintiff to come on record because no interest has come to or devolved on the plaintiff within the meaning of O. 22, r. 10. Therefore if the application of the appellant is viewed purely as one under O. 22, r. 10 it is unsustainable. The next question is whether under O. 1, r. 10 the applicant will be entitled to ask the Court to make him a party thereto. Under the said rules before the Court can exercise its discretion the presence of a party must be felt by the Court to be necessary to enable it to effectually and completely adjudicate upon and settle all the questions involved in the suit. The words "all the questions involved" in the rule have been variously interpreted. In *Sri Mahant Prayag Das* v. *Board of Commissioners for Hindu Religious Endowments, Madras,*[1] Srinivasa Ayyangar, J., was inclined to

1. (1926) 51 M.L.J. 148: I.L.R. 50 Mad. 34.

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think that it only relates to questions between the parties to the litigation, but a different view was taken in *Vydianadayyan* v. *Sitaramayyan*[1]. There Turner, C.J., observed:—

> "To accept the more restricted interpretation involves the addition of words which we do not find in the section, namely, 'between the parties to the suit,' and there can be few, if any, questions which cannot be determined between the parties to the suit one way or the other, and of which the determination, if they be material, will, as between the parties to the suit, not be final. On the other hand, the interpretation warranted by the terms would enable the Court to avoid conflicting decisions on the same question which would work injustice to a party to the suit, and finally and effectually to put an end to litigation respecting them".

The underlying principle regarding the addition of parties is that there must be finality to litigation and to secure that purpose it would be incumbent upon the Court to add a party whose presence would be necessary to put an end to all the controversy in the litigation finally. This is the view taken by a Division Bench of this Court in *Seethai Achi* v. *Meyyappa Chetti*[2] in this very case where Sundaram Chetty, J., relying on *Vydianadayyan* v. *Sitaramayyan*[1] observed:

> "If there is a question common to the parties on record and a stranger, as regards the subject-matter of the suit or any portion thereof, it should be tried once for all by allowing the stranger to be made a party".

This is also the view taken by Venkatasubba Rao, J., in *Secretary of State* v. *Murugesa Mudaliar*[3]. This in my view would be the correct interpretation of the rule. Now, is the question whether a suit has been terminated by a valid compromise a question involved in the suit? Ordinarily a suit must be tried on a cause of action alleged in the plaint and on the state of facts on the date of institution of the suit. Viewed from that standpoint it cannot be said that whether a suit has been terminated by a compromise subsequent to the institution of the suit is a question involved in the suit. But it seems to me that it would be taking a narrow view of the rule. Further it is not a rigid rule that a suit must be tried only on the state of facts existing on the date of suit. The Court very often has to take notice of events which happened subsequent to the institution of the suit and mould relief according to the state of circumstances existing on the date of the decree. When a

1. (1881) I.L.R. 5 Mad. 52.
2. (1934) 66 M.L.J. 517: I.L.R. 57 Mad. 892.
3. A.I.R. 1929 Mad. 443.

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suit has been adjusted by a valid compromise and it is brought to the notice of the Court as has been held in *Appasami Nayakan* v. *Varadachari*[1] the Court is bound to raise an issue whether the suit has been adjusted by a valid compromise and proceed to determine it. In that case the learned Judges Collins, C.J. and Benson, J., observed thus:

"When the defendants alleged a compromise for consideration in the course of the suit and the plaintiffs denied it, an issue arose between them, and the District Munsiff was right to record it and determine it, so as to enable him to deal with the suit under S. 375, Code of Civil Procedure."

By reason of subsequent events the issue as to compromise has become a question involved in the suit. If in regard to that matter in the opinion of the Court the presence of a third party would be necessary to enable it to effectually and completely adjudicate that issue it is open to the Court to do so. Viewed even on that footing it would be difficult to maintain that the mere addition of the appellant would enable the Court to effectually and completely adjudicate the question as to compromise. The Court cannot forget to notice the fact that the plaintiff had made an adoption before the compromise was made a decree of the Court. When the compromise itself is impeached on one ground or other by either party to the litigation and none of the parties seeks to enforce it, I do not think it would be a proper exercise of discretion at the instance of a third party who alleges that he has acquired rights thereunder to make him a party for the purpose of enforcing the compromise especially in the view I have taken that there is no transfer of any interest in the subject-matter of the litigation in his favour. The matters relating thereto, can and ought to be properly determined in a suit. Further I find a suit has been instituted by the appellant for a declaration that the compromise is binding on all the parties to the said suit and therein the adopted son is also a party and the necessary issues have been framed thereunder. Mr. T. M. Krishnaswamy Ayyar on behalf of the second and third defendants has also intimated to me that in regard to none of the issues raised in the said suit his clients would press the plea of *res judicata*. As therefore all the questions relating to the compromise will be gone into in the suit and the appellant's rights thereunder will be declared, I am not inclined to accede to the request of Mr. Srinivasa Ayyangar to implead his client as a party

1. (1896) I.L.R. 19 Mad. 419.

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defendant under O. 1, r. 10, Civil Procedure Code. In the result the Civil Miscellaneous Appeal fails and is dismissed with costs.

S. V. V. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD MACMILLAN, SIR SHADI LAL AND SIR GEORGE RANKIN.

Kumar Krishna Prosad Lal Singha Deo .. *Appellant**

v.

The Baraboni Coal Concern, Limited and others .. *Respondents.*

P.C. — Krishna Prosad Lal *v.* B.C. Concern, Ltd.

Evidence Act (I of 1872), S. 116—Scope—Landlord and tenant—Estoppel of tenant from denying landlord's title—When applicable—Dispute as to derivative title—Beginning of new tenancy.

The estoppel against denial of a landlord's title imposed by S. 116 of the Indian Evidence Act applies not only where it is shown that the landlord put the tenant into possession of the property, but also where a person already in possession becomes tenant to another. The section postulates that there is a tenancy still continuing, and that it had its beginning at a given date from a given landlord, and it provides that neither a tenant nor anyone claiming through a tenant shall be heard to deny that the particular landlord had on that date a title to the property. What the tenant is precluded from denying is that the lessor had a title on the date of the lease, and the rule applies even in a case where the lease itself discloses the defect of title. But the section does not apply so as to disentitle the tenant from disputing the *derivative* title of one who claims to have since become entitled to the reversion, though in such cases there may be other grounds of estoppel. Nor does it apply to prevent the tenant from pleading that the title of the original lessor has subsequently come to an end.

When a demise of land is made and acted on, and when a tenant proceeds to occupy and enjoy the leased property under the grant and receives the shelter of the landlord's title there is no reason why he should be free from the estoppel imposed by S. 116. The tenancy, under the section, does not begin afresh every time that the interest of the tenant or of the landlord devolves upon a new individual by succession or assignment.

Bilas Kunwar v. *Desraj Ranjit Singh,* (1915) 29 M.L.J. 335: L.R. 42 I.A. 202 at 207: I.L.R. 37 All. 557 at 567 (P.C.); *Vertannes* v. *Robinson,* (1927) 53 M.L.J. 71: L.R. 54 I.A. 276: I.L.R. 5 Rang. 427 (P.C.); *Lal Mahomed* v. *Kallanus,* (1885) I.L.R. 11 Cal. 519 and *Ketu Das* v. *Surendra Nath Sinha,* (1903) 7 C.W.N. 596, considered.

Decision of the Calcutta High Court affirmed.

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* P. C. Appeal No. 35 of 1936. 4th June, 1937.
Bengal Appeal Nos. 4, 6 and 7 of 1935.

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Consolidated appeals from a decree of the High Court of Judicature, Fort William, Bengal (Mitter and Patterson, JJ.) reversing a decree of the Subordinate Judge of Asansol.

A.M. Dunne, K.C. and *J.M. Parikh* for Appellant.

Sir Thomas Strangman, Vaisey, K. C. and *H. S. Chatfield* for Respondents.

29th, 30th April, and 4th June, 1937. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—The plaint in this case was filed on the 18th November, 1927, and the claim of the plaintiff is for royalties due on coal raised during that year (up to the end of Aswin: the 17th October) from a colliery known as Monoharbahal under the terms of a lease dated the 25th January, 1912. The grantor of the lease is the Raja of Panchkote (defendant No. 3); the plaintiff, who is his son, claims the royalties due thereunder by virtue of a maintenance (korposh) deed dated the 29th September, 1926, which vests the landlord's reversion in him; no dispute arises upon this assignment. The original lessee, one, Radha Ballav Mukherjee, has not been impleaded, the defendants being the Baraboni Coal Concern, Limited, defendant No. 1 (the defendant company) and two others [defendants Nos. 2 and 2 (*a*)]. The defendant company are sued as assignees of the term, their assignment being by deed dated the 14th February, 1914; and the other defendants as persons claiming to have purchased the right, title and interest of the defendant company at a sale held under the Public Demands Recovery Act (Bengal Act III of 1913) on the 17th August, 1927. These defendants [Nos. 2 and 2 (*a*)] say that they did not obtain possession under their purchase until the 20th March, 1928. The lease contained a clause (cl. 14) giving the lessor a charge for royalties upon the colliery and its plant, and the plaint seeks to enforce this charge by sale.

The defence of the defendant company was that the Raja had no title to the underground rights in Mousa Monoharbahal which was the lakheraj debutter property of a certain deity. This allegation was in the written statement embroidered with, or encumbered by, allegations of fraud and misrepresentation on the part of the Raja, and mistake on the part of the defendant company. The Subordinate Judge at Asansol dismissed the suit (the 23rd December, 1929), holding not only that the

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Raja had no title but also that the defendant company had been evicted by title paramount. On appeal to the High Court at Calcutta four questions were raised and the learned Judges (Mitter and Patterson, JJ.) held (1) that Mousa Monoharbahal was not part of the Raja's permanently settled estate; (2) that the underground rights therein are vested in the lakherajdar, that is, the deity above mentioned; (3) that under S. 116 of the Indian Evidence Act the defendant company was precluded from disputing the Raja's title; (4) that the defendant company's plea of eviction by title paramount failed. As against the other defendants, the learned Judges held that the covenant for rent was enforceable against transferees of the lease. They gave decree (the 20th July, 1934) against all the defendants for the sums claimed and directed a sale of the colliery and plant in default of payment by the 20th January, 1935.

The ownership of mining rights in a mousa which, although within the ambit of a permanently settled estate, is rent free debutter property not paying revenue to Government on its own account, raises questions of considerable difficulty, and practical persons interested in coal mining have to take account of the uncertainty involved. The defendant company, on their own case, took title to the colliery Monoharbahal in two ways and from two different sets of persons at or about the same time. (*a*) By deed dated the 14th February, 1914, they took an assignment from Radha Ballav Mukherjee of his lease (the 25th January, 1912) from the Raja; (*b*) by deed dated the 22nd June, 1917, they took from the Official Assignee and others an assignment of certain leases granted in 1901 and 1908 by shebaits of the deity, the deed of assignment reciting that an agreement to that effect had been arrived at in November, 1913, and that possession had been given to the defendant company on or about the 1st April, 1914. As they were taking inconsistent titles, it may perhaps be presumed that the insecurity of each was reflected in the amounts of the royalties which had been covenanted for. In any event, each lessor was in due course asked to reduce the royalties payable to him in view of the claims of the others. The shebaits do not seem to have agreed to any abatement, but, by a deed called a *kabulyat*, dated the 1st November, 1918, and made between the defendant company and the Raja, it was

recited that the defendant company had acquired title under the shebaits of the deity, and it was agreed that, if the Raja should establish up to the highest Court that the deity had no rights, he should be entitled to get from the defendant company a royalty of 7 annas per ton of coal instead of the 3 annas reserved by the lease of the 25th January, 1912, but that otherwise and in the meantime the royalty should be reduced to 2 annas per ton. Part of a new term which was to be treated as included in the lease of 1912 was as follows:—"We shall not be competent to raise any objection to the payment of commission at the rate of 2 annas on the score of your not having title to the underground rights in respect of the said mousa or on any other account."

To take title from two rival sets of claimants may have been a good business step, but it involved keeping faith with both; and it may be said at once that neither set of lessors could be got rid of at will by the simple process of failing to pay rent to the other, suffering judgment at the other's instance on the covenant for rent, and then pleading eviction by title paramount to the claim of the former. In the present case this was all that happened. Two suits for royalties were brought against the defendant company—in each case by one out of four shebaits of the deity who, on the 24th May, 1901, had joined in granting a lease of 8 annas interest in the mousa. Both suits succeeded before the Subordinate Judge of Asansol notwithstanding that the defendant company set up the title of the Raja, because the Subordinate Judge rightly held them estopped by S. 116 of the Evidence Act from disputing the plaintiff shebaits' title, and held that there was no eviction by title paramount. His decrees (the 12th July, 1927) were taken on appeal to the High Court, and one was affirmed on the 18th February, 1930. A further appeal was taken by the present defendant company to His Majesty in Council in that case. The appeal was upheld and the judgments of the two Courts below set aside on the ground that the plaintiff, as one only of four lessors, had no title to sue for an aliquot part of the whole rent. In the meantime, however, the plaintiff in the other suit (which was subject to the same defect of parties) had proceeded to attach the Monoharbahal colliery in execution of his decree (May-June, 1928). Thereupon a firm called Chandanmull Indra Kumar [the present defendant 2 (*a*)],

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who had purchased the colliery at a certificate sale for road cess in August, 1927, objected to the execution, but their claim case was dismissed (the 20th June, 1928). They brought a suit against the shebait decree-holder to establish their right against him, and on the 29th January, 1929, a compromise was agreed to between them whereby this shebait for his own 2 annas share agreed to recognise the firm's title to the colliery and to grant them a patta on certain new terms as to royalty upon receiving Rs. 13,000. He also agreed not to execute his decree, and there was a new clause granting him a charge on the colliery for future royalties. The appeal of the defendant company against his decree was compromised as part of this arrangement.

This is the only basis for any plea of eviction by title paramount, and their Lordships are of opinion that the plea fails on the facts. No one of the shebaits has at any time sued the Raja, attacking his title, or done more than require the defendant company to perform their covenants under the lease of 1901 as assignees thereof. Apart from the consequences of their own breach of covenant and of their other debts, the defendant company have not even been threatened with disturbance. The plea of eviction by title paramount was not taken in the written statement nor was any issue framed upon it.

In their Lordships' view it is entirely without substance, and it is unnecessary to consider whether, upon a true construction, the deed of the 1st November, 1918, would require the defendant company to continue to pay royalties notwithstanding an eviction by title paramount.

The remaining question arises upon the plea taken by the defendant company that the Raja had no right to the property in suit. This was the second of the issues as framed, and it is as well that it should be dealt with independently of any difficulty arising to the defendant company out of the agreement expressed in the *kabulyat* of the 1st November, 1918. As distinct from a plea of eviction by title paramount—a valid and meritorious defence if made out—this plea has long been regarded as inept and incompetent in so far as it is a denial that the lessor had any title at the date of his grant. It was observed by Baron Martin in *Cuthbertson* v. *Irving*[1]:

1. (1859) 4 H. & N. 742 at 757 and 758: 157 E.R. 1034.

"If the lessor have no title, and the lessee be evicted by him who has title paramount, the lessee can plead this and establish a defence to any action brought against him........but, so long as the lessee continues in possession under the lease, the law will not permit him to set up any defence founded upon the fact that the lessor '*nil habuit in tenementis*; and that upon the execution of the lease there is created in contemplation of law a reversion in fee simple by estoppel in the lessor, which passes by descent to his heir, and by purchase to an assignee or devisee...... This state of law in reality tends to maintain right and justice, and the enforcement of the contracts which men enter into with each other (one of the great objects of all law); for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of his lessor, really is. All that is required of him is, that having received the full consideration for the contract he has entered into, he should on his part perform it."

Not every word of this passage can be taken as law in India at the present time, but it is a useful exposition of the reason which underlies the well-known doctrine of estoppel which has been enacted for India in S. 116 of the Indian Evidence Act. It discloses also the answer given by English law to the objection (of which something was heard at their Lordships' bar) that an assignee, being liable upon the covenants only by privity of estate, cannot be made liable if the lessor has no estate, an objection which serves only to emphasise the importance of this estoppel.

S. 116 of the Indian Evidence Act is as follows:—

"116. No tenant of immovable property, or person claiming through such tenant shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

The defendant company contended before the High Court that the section only applies where it is shown that the landlord put the tenant into possession of the property, and that, when a person already in possession of land becomes tenant to another, there is no estoppel against his denying his lessor's title. The application of this doctrine to the facts of the present case was made by contending that the defendant company in 1914 had obtained possession from the Official Assignee under the shebaits' leases before they were given possession under the lease from the Raja. The High Court have not thought it probable that the Official Assignee would give possession before the assignment of 1917 was executed, and it seems to their Lordships, as to the High Court, to be satisfactorily

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proved that the defendant company were first put into possession under the Raja's lease and in pursuance of the assignment of the 14th February, 1914. On this view, the defendant company's construction of S. 116 is of no service to them.

Their Lordships, however, cannot accept either the construction contended for or the defendant company's method of applying it. The section does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. It deals with one cardinal and simple estoppel and states it first as applicable between landlord and tenant and then as between licensor and licensee, a distinction which corresponds to that between the parties to an action for rent and the parties to an action for use and occupation. Whether during the currency of a term the tenant by attornment to *A* who claims to have the reversion, or the landlord by acceptance of rent from *B* who claims to be entitled to the term is estopped from disputing the claim which he has once admitted are important questions, but they are instances of cases which are outside S. 116 altogether; and it may well be that, as in English law, the estoppel in such cases proceeds upon somewhat different grounds and is not wholly identical in character and in completeness with the case covered by the section. The section postulates that there is a tenancy still continuing, that it had its beginning at a given date from a given landlord. It provides that neither a tenant nor anyone claiming through a tenant shall be heard to deny that that particular landlord had at that date a title to the property. In the ordinary case of a lease intended as a present demise—which is the case before the Board on this appeal—the section applies against the lessee, any assignee of the term and any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title at the date of the lease, and there is no exception even for the case where the lease itself discloses the defect of title. The principle does not apply to disentitle a tenant to dispute the *derivative* title of one who claims to have since become entitled to the reversion, though in such cases there may be other grounds of estoppel, for example, by attornment, acceptance of rent, etc. In this sense it is true enough that the principle only applies to the title of the landlord who "let the tenant in", as distinct from any other person claiming to be

reversioner. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end.

In the present case, therefore, the defendant company could not dispute that the Raja in 1912 had title to the property demised, and this merely by reason of their position as assignees of the term. There is no ground whatever for the notion that Radha Ballav did not get possession or never had more than what in English law was called an *interesse termini.* He entered under the lease, and he and his assigns have occupied and paid rent under it for years. An inquiry whether the defendant company, when they took their assignment in 1914, were or were not then in possession has in their Lordships' view no bearing whatever upon the application of S. 116 or on the rights of the parties. It is quite true that in this particular case the assignment by the lessee to the defendant company was part of a compromise to which the Raja was a party; but the defendant company took no new title from him; they took the title of his lessee although the Raja, as a party to the compromise, was precluded from denying that the original term was now vested in them. "The tenancy" under S. 116 does not begin afresh every time the interest of the tenant or of the landlord devolves upon a new individual by succession or assignment. In India, where tenants may have occupancy right and permanent or unlimited tenures are well known, the application of S. 116 may not always be clear; but the present case raises no difficulty, and, there being no dispute as to the plaintiff's derivative title, it seems profitless to inquire into the position as at 1914 when the landlord was not purporting to pass any title.

Further, their Lordships cannot accept the construction of S. 116 for which the defendant company contended. There is in English case law some authority for the view that a tenant is only estopped from denying his landlord's title if at the time when he took his lease he was not already in possession of the land. But in S. 116 the Indian legislature has formulated no such condition. The words "at the beginning of the tenancy" give no ground for it. When a demise of land is made and acted on, when the tenant proceeds to occupy and enjoy under the grant, and receives the shelter of the grantor's title and the benefit of his covenants, it is difficult to see why "during the

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continuance of the tenancy" he should be free of this form of estoppel. "Tenant who has occupied but not entered" is a difficult notion to thrust into S. 116 and quite impossible to find therein. *Cuthbertson* v. *Irving*[1] was the common case of a tenant who, on the expiry of one lease, took a new lease from his former landlord's vendee. In *Claridge* v. *Mackenzie*[2] it was suggested that the test should in such a case be whether the new lessor could have refused to let the tenant continue in possession, but this is to beg the very question of title. Stress has often been laid on the fact of the landlord having let the tenant in. Where that is clear, as it is in most cases, it is a pointed way of stating what the tenant has gained by taking title under his lessor. It also points firmly to the fact of a new tenancy beginning at that time. In this sense may be understood the language of Sir George Farwell delivering the judgment of the Board in *Bilas Kunwar* v. *Desraj Ranjit Singh*[3]. On the other hand, in *Vertannes* v. *Robinson*,[4] the Board applied S. 116 to a case in which it was difficult to say that the tenant had obtained possession from the landlord. Of the Indian cases, *Lal Mahomed* v. *Kallanus*[5] and *Ketu Das* v. *Surendra Nath Sinha*[6] have sometimes been taken as establishing the doctrine now advanced by the defendant company, but both cases are really outside S. 116, not being concerned with title at the beginning of the tenancy, but with the common case of a sitting tenant attorning to a new individual as entitled to receive rent. It is important to notice in such cases that neither a new tenant nor a new kabulyat necessarily implies a new tenancy.

The defendants 2 and 2 (*a*) who, under S. 20 of the Public Demands Recovery Act, 1913, have been invested with "the right, title and interest" of the defendant company at the 17th August, 1927, may or may not be liable on the covenant for royalties in respect of coal raised (if any) between that date and the 17th October of that year, (end of Aswin 1334 Bengali style), which is the date up to which the plaintiff claims by his plaint. The claim is of small importance and is

1. (1859) 4 H. & N. 742 at 757 and 758: 157 E.R. 1034.
2. (1842) 4 Man. and G. 143: 134 E.R. 59.
3. (1915) 29 M.L.J. 335: L.R. 42 I.A. 202 at 207: I.L.R. 37 All. 557 at 567 (P.C.).
4. (1927) 53 M.L.J. 71: L.R. 54 I.A. 276: I.L.R. 5 Rang. 427 (P.C.).
5. (1885) I.L.R. 11 Cal. 519.
6. (1903) 7 C.W.N. 596.

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not pressed by the plaintiff. Their Lordships will therefore modify the High Court's decree which treats these defendants as liable for the whole claim. The decree will be varied by restricting it, in so far as it is a decree for money, to the defendant company who, if held liable at all, do not resist liability for whatever coal they raised. But it is clear that the right which the other defendants have obtained by the certificate sale is subject to the plaintiff's charge upon the colliery and plant for the royalties claimed in the suit. It is therefore unnecessary to interfere with that part of the High Court's decree which enforces the charge.

The appeals before their Lordships have been consolidated, but they are three in number. On the appeal by the plaintiff their Lordships have not entered into the question whether he or the Raja have or had title to Mousa Monoharbahal and make no pronouncement upon it, as in their view the defendants were not entitled to raise it. The appeal, however, must fail, as no complaint can be made of the decree. The appeal by the defendant company fails for the reasons above stated. The appeal by defendants 2 and 2 (*a*) succeeds on the question of their personal liability for the royalties, but the mistake in the High Court's decree is due, in their Lordships' opinion, to these defendants' not having drawn attention to the matter at the proper time, and the plaintiff has not resisted the correction of the mistake.

The liability under the first operative clause of the decree will be confined to the defendant company. Subject thereto their Lordships will humbly advise His Majesty that all the appeals should be dismissed. They make no order as to the costs of the appeals.

Solicitors for Appellant: *Stanley Johnson & Allen.*

Solicitors for Respondents: *Oswald Hickson Collier & Co.* and *R. S. M. Calder.*

R. C. C. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VARADACHARIAR.

The Secretary of State for India in Council represented by the Collector of Ganjam .. *Appellant** *(1st Defendant)*

v.

Lokanatha Behara and another .. *Respondents (Plaintiff and 2nd Defendant).*

Secretary of State for India in Council *v.* Lokanatha Behara.

Limitation Act (IX of 1908), S. 10, Art. 120—Order under S. 146, Criminal Procedure Code—Lands taken possession of by Government—Suit for recovery of income received by Government—Starting point of limitation.

As a result of disputes between the plaintiff and his father in 1908 with regard to the possession of certain lands, the Magistrate passed an order under S. 146, Criminal Procedure Code, and put the properties in the possession of some third persons. The income from the lands was being paid into the treasury. The Government never claimed to hold the money for themselves. The father died about 1915 and in 1927 the suit was filed for recovery of amounts paid into the treasury between 1910 and 1917. There was no denial of plaintiff's right by the Government before 1927.

Held, that assuming S. 10 of the Limitation Act does not apply, the only article applicable will be Art. 120 and under that article the starting point will be the date when the plaintiff's right was clearly and unequivocally denied or threatened by the Government and not the date of the father's death.

Second appeal against the decree of the Court of the Subordinate Judge of Berhampore in A. S. No. 56 of 1932 (A. S. No. 221 of 1931, District Court, Ganjam) preferred against the decree of the Court of the District Munsif of Aska in O. S. No. 801 of 1929.

The Government Pleader (K. S. Krishnaswami Aiyangar) for Appellant.

Respondents not represented.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a somewhat unusual claim but the Courts below have found in the plaintiff's favour on the facts. The main point for determination in the second appeal is the question of limitation.

In 1909 there were disputes between the plaintiff and his father as to the possession of certain lands, the father claiming them to be his self-acquisitions and the plaintiff claiming them to be ancestral property in his possession. To avoid a breach of the peace, the Magistrate passed an order under S. 146 of

* S. A. No. 672 of 1933. 26th April, 1937.

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the Criminal Procedure Code, early in 1910, but instead of appointing a receiver to manage the property, he asked the village karji, the second defendant to look after the lands. The village karji deposes that he looked after the lands only for one or two years and that thereafter the Magistrate got the lands cultivated by somebody else and the sale proceeds were being deposited in the treasury. On account of acts of violence committed by the plaintiff on his father's tenants, the plaintiff was sentenced to imprisonment for about a year about this time and after he came out of the jail he says he went on a pilgrimage. When exactly he returned or how long he was absent from the village it is not possible from the evidence to say. The father appears to have died somewhere about 1915. In some manner, which it is not now necessary to examine, the actual possession of the lands seems to have somehow been obtained by certain mortgagors from the Magisterial authorities. The present suit relates to the moneys alleged to represent the income deposited in the treasury, during the years 1910 to 1917. So far as the record discloses, it is only in 1927 that the plaintiff sent a lawyer's notice to the Collector asking for payment of the money and threatened to sue in default of payment. The Collector as usual replied that the threatened suit would be awaited. It does not appear anywhere that the plaintiff's right was denied at any earlier stage.

The Courts below decided against the defendants on the plea of limitation on the ground that the case was governed by S. 10 of the Limitation Act. I do not think it is necessary to canvass the correctness or otherwise of the position that in circumstances like those of the present case Government can be held to be a trustee in whom the property has become vested in trust for a specific purpose. It is not disputed that if S. 10 is out of the way, the only article applicable to the suit will be Art. 120. The question is, when does the six years' period of limitation under that article begin to run in such a case.

It may be useful to refer here to another contention urged on behalf of the Government, namely, that the plaintiff has no cause of action at all for the present suit because there has in fact been no adjudication at all by a Civil Court in the sense contemplated by S. 146 of the Criminal Procedure Code. The Courts below rightly overruled it on the ground that as the only dispute was between the father and the son and on the

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father's death the son became undisputedly entitled to the property, it was not necessary to file a suit to obtain a declaration. But this contention is relevant to show that in the circumstances of the case the plaintiff could not possibly have had a cause of action against the Government immediately the money was received in any particular year as representing the income of land. We must therefore find some other starting point than the dates when the sums were received even for the application of art. 120. Though the Government might not be regarded as a trustee within the meaning of S. 10 they were at least in the position of stakeholders and never claimed to hold the money for themselves. In applying Art. 120 to a case of this kind, it is not proper to say that limitation began to run at least from the plaintiff's father's death, on the assumption that the plaintiff could at the moment have claimed payment of the money in the Government's hands. As observed by the Judicial Committee in *Mt. Bolo* v. *Mt. Koklan*[1] and some of the cases following it, the suit will be within time if instituted within six years of the date when the plaintiff's right was clearly and unequivocally denied or threatened by the Government. As I have already observed, no such denial took place more than six years before suit in this case even if the Collector's reply to the plaintiff's notice of suit could be regarded as a denial. On this ground I hold that the Courts below were right in their conclusion that the suit was not barred by limitation.

A further contention was raised before me, on behalf of the Government, that it is for the plaintiff to prove how much has been deposited with the Government and that, as he has adduced very little evidence in support of his version, the decree of the Courts below is not sustainable. The case is certainly one in which under S. 106 of the Evidence Act the onus lies upon the Government. Having regard to the nature and extent of the land and the general evidence as to the probable yield, the Courts below rightly held that the plaintiff's estimate was modest and reasonable. The Government can no doubt plead in extenuation the destruction of some of the relevant records in accordance with the well-known rules. But as pointed out by the Courts below, one set of books known as shroff's books are expected to have been preserved under the

1. (1930) 59 M.L.J. 621: L.R. 57 I.A. 325: I.L.R. 11 Lah. 657 (P.C.).

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rules for a period of twenty years, and indeed the books for some years were actually produced before the appellate Court. I am asked to read the entries in some of those books and say that they are not specific enough to be held to relate to the plaintiff's claim. If these books had been produced in the trial Court, other evidence would presumably have been forthcoming to connect them with the sources from which the income referred to therein was received. If those who were conducting the case for the Government in the lower Court did not care to take steps to produce the books which in fact were made available on a more diligent search when the case was pending before the appellate Court that is no reason for making the plaintiff responsible for the consequence. I therefore see no reason to interfere with the finding of the Courts below as to the amount payable to the plaintiff. The second appeal fails and is dismissed, but as the respondent is not represented, there will be no order as to costs.

Leave to appeal asked for is refused.

S. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice.*

Ramath Kappalli Kelu Kurup .. *Petitioner* (1st Defendant)*

v.

Eacharambath Madathil Subramania Aiyar and another .. *Respondents (Plaintiff and 2nd Defendant).*

Kelu Kurup *v.* Subramania Aiyar.

Civil Procedure Code (V of 1908), S. 115—Suit tried as Small Causes by a Munsif—Suit within his jurisdiction as an original suit—Revision—Decree not incorrect nor unjust—High Court, if bound to interfere in revision.

If a District Munsif sitting on the wrong side of his Court (here Small Cause side) passes a decree which is correct in the opinion of the High Court, the High Court need not in revision set it aside merely because he has passed it on the wrong side, if the High Court would have upheld it had it been passed on the right side.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsiff of Badagara dated the 31st day of October, 1935, and passed in S. C. S. No. 291 of 1935.

* C. R. P. No. 287 of 1936. 5th April, 1937.

Kelu Kurup v. Subramania Aiyar.

K. K. Sridharan for Petitioner.

C. K. Viswanatha Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The point that is constantly being agitated in the High Court is again before me, that is, the question whether the High Court is bound to interfere in revision when the trial Court had no jurisdiction to try the suit, that is, where the District Munsiff has wrongly tried an original suit on the Small Cause Side or conversely has tried a Small Cause Suit on the Original Side. This point as to jurisdiction is constantly taken for the first time in the High Court and I am satisfied from the cases which have been put before me that the majority opinion in this High Court is that the High Court is not bound to allow the point under such circumstances to be taken or if it is allowed to be taken the High Court is not bound to interfere in revision if it is satisfied that the lower Court's decree was correct. This latter point put in the following way I think seems in justice and reason to be capable of only one answer. If the District Munsiff sitting on the wrong side of his Court, passes a decree which is correct in the opinion of the High Court, to whom a Civil Revision Petition is presented, must the High Court set that decree aside merely because he has passed it on the wrong side of the Court though the High Court would have upheld it had it been passed on the right side of the Court? The answer to this question seems to me to be clearly in the negative, namely, that the High Court is not bound under such circumstances to interfere in revision. In the present case, the point was taken in the lower Court and even if the District Munsiff in holding that the suit was one of a Small Cause nature may have been wrong, a point upon which I express no opinion, I see no reason for holding that the decree passed was incorrect or unjust. Under these circumstances this Civil Revision Petition must be dismissed with costs.

S. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Ettiyar Ahmed Kutty and others .. *Appellants** *(Plaintiffs 2 to 9, 11 to 14, 17 and 18)*

v.

Vayalilakath Ayithraman Kutty and others .. *Respondents (Defendants 1, 26 and 27).*

Ahmed Kutty *v.* Ayithraman Kutty.

Trust—Property of a mosque trespassed upon by defendant—Representative suit for declaration, removal of structure built on the property and for possession—Trustee not known—Whether worshippers of mosque could bring a suit on behalf of the trust—Considerations to be entertained.

The principles which regulate the right of suit by a worshipper in relation to trust property are now well settled. When there is a lawful trustee for an institution, he is the person competent to institute a suit in relation to the property of the institution, to take the necessary steps for safeguarding and preserving it and to eject a trespasser and recover possession thereof for the trust, but the recovery of the property is only for and on behalf of the institution which he represents. But where a trustee has alienated the trust property and therefore would not proceed to recover possession of the same or has disabled himself otherwise from maintaining a suit in respect thereof or declines to institute a suit, it cannot be said that the institution is without a remedy. The worshippers, who are the beneficiaries entitled to participate in the benefits of the institution, are entitled to maintain a suit for preserving the trust property or restoring the property to the trust either by instituting a suit for declaration or for an injunction or even for possession; but whether the worshippers are entitled to claim all or any of the reliefs which a trustee is entitled to do in a properly framed suit would depend upon the circumstances of each case. It is desirable and necessary to make the trustee a party to the suit, and where he is made a party it is open to the Court to mould the relief as the circumstances may require. If the suit is one brought for possession by the worshippers, the Court can, after declaring the property to be trust property and setting aside the alienation, direct delivery of possession to the trustee. In cases where there is no trustee, it is open to the Court to direct delivery of possession to the worshippers on behalf of the trust. [*Rangaswami Naidu* v. *Krishnaswami Aiyar*, (1922) 44 M.L.J. 116.] Again in certain circumstances it is competent to the worshippers to maintain an action for a declaration that a certain property is trust property and for an injunction restraining the defendant from interfering with their right of worship, which is a personal right, without making the trustee a party to the suit. This would not offend the principle that a trustee alone is competent to maintain a suit to eject a trespasser. See *Kuvarbai* v. *Mir Alam Khan*, (1883) I.L.R. 7 Bom. 170.

Where a representative action was brought against the first defendant to demolish and remove a structure on the property claimed to belong to a mosque and for possession of the same and the defence questioned the title of the mosque to the property and the first Court held that the property belonged to the mosque, that the defendant was a trespasser and that some

* S. A. No. 46 of 1936, 16th April, 1937.

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of the plaintiffs who were elders were to get possession of the same, but the Subordinate Judge who heard the appeal against the first Court's judgment dismissed the suit on the ground that the plaintiffs could not maintain the suit.

Held, that the suit was maintainable as such and that the lower Court should decide the issues who was the Muthavalli and whether some of the plaintiffs who claimed management on behalf of the trust were *de facto* managers as claimed by them.

Held, further, that if the twenty-sixth defendant claiming to be Muthavalli or the plaintiffs who claimed to be *de facto* managers were found to be unjustified in their claims, the Court might award possession to plaintiffs on behalf of the trust, so that when appropriate proceedings were instituted for the management of the trust property and a trustee should get appointed, they might hand over possession to him.

Srinivasacharlu v. *Subuddhi*, (1888) 23 M.L.J. 348; *Zafaryab Ali* v. *Bakhtawar Singh*, (1883) I.L.R. 5 All. 497; *Muhammad Alam* v. *Akbar Husain*, (1910) I.L.R. 32 All. 631; *Maulavi Muhammad Fahimul Huq* v. *Jagat Ballav Ghosh*, (1922) I.L.R. 2 Pat. 391; *Ashraf Ali* v. *Mohammad Nurojjoma*, (1918) 23 C.W.N. 115; *Subramania Aiyar* v. *Nagarathna Naicker*, (1909) 20 M.L.J. 151 and *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar*, (1917) 33 M.L.J. 357: I.L.R. 41 Mad. 124 at 135, relied on.

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 138 of 1932, preferred against the decree of the Court of the District Munsiff of Parappannangadi in O. S. No. 146 of 1930.

B. Sitarama Rao and *B. Pocker* for Appellants.

K. Kuttikrishna Menon and *P. Narayanan Nair* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal is against the decree of the learned Subordinate Judge of South Malabar dismissing the plaintiff's suit which is a representative action filed on behalf of the Mussalmans of Feroke for an injunction directing the first defendant to demolish and remove the structure put up in the plot which is claimed to be an adjunct of the Jemath mosque at Feroke, for possession of the same by the plaintiffs on behalf of the mosques and the Mussalman public of Feroke and for granting all other reliefs to the plaintiffs for and on behalf of the mosque which the Court may deem fit to grant. The ground of the claim is that the Jemath mosque belongs in common to the Feroke Mussalman public, that the dead bodies are buried in the Paramba of the mosque and that the plaintiffs congregate, at the said mosque for worship. The necessity for the institution of this suit is alleged to be a trespass by the

defendant in that he has put up a shed and has been attempting to build a stone structure besides opening a tea-shop therein. It is stated in the plaint, that the karnavans or elders have been managing the affairs of the mosque, but it is not stated who the karnavans are. The first defendant alleges that the suit property does not belong to the mosque and it is not trust property. He further set up a title to the suit property in the twenty-sixth defendant as muthavalli and denied the title of the plaintiffs to sue as it was the muthavalli alone that could maintain such a suit. The twenty-sixth defendant was impleaded as a party defendant to the suit. While supporting the first defendant in the contention that he is the muthavalli of the mosque and that the affairs of the mosque are under his control, the twenty-sixth defendant in his written statement alleges that the suit property does not belong to the mosque, that the mosque had no right over it, at any time, and that it is not useful in any way for the mosque. He also contended that the Mussalmans who assemble in the Jemath mosque are not entitled to recover the suit property. The points in controversy that arose on the pleadings were whether the suit property is trust property belonging to the mosque or private property as asserted by the defendants and whether the plaintiffs are competent to sue for all or any of the reliefs claimed in the plaint. The learned District Munsiff who tried the suit, came to the conclusion that the property is trust property attached to the mosque, that the first defendant was a trespasser, and that the plaintiffs 2, 4, 5, 6 and 8 were the elders who were in management of the affairs of the mosque without their being appointed as such by anybody. He however thought that a mandatory injunction was not necessary and he therefore gave a decree for possession on behalf of the general public of Feroke by directing the first defendant to remove the basement on the plot which he erected in contemplation of the stone structure intended to be put up by him. The learned Subordinate Judge dismissed the plaintiffs' suit on the ground that the plaintiffs as worshippers of the mosque cannot maintain the suit for possession of the mosque property.

It is contended in this second appeal by Mr. Sitarama Rao on behalf of the plaintiffs that the view of the learned Subordinate Judge was wrong and that even assuming they are not competent to maintain the suit for possession on the allegations in the plaint the learned Subordinate Judge was not warranted

in dismissing the suit. I may at once state that the learned Judge did not go into the question whether the property was trust property or not, whether there was any muthavalli for the mosque or whether there were any accredited managers for the institution who were in management *de facto* of the mosque property because in the view he took he considered it unnecessary to go into those questions. The principles which regulate the right of suit by a worshipper in relation to trust property are now well settled. Where there is a lawful trustee for an institution, he is the person competent to institute a suit in relation to the property of the institution, to take the necessary steps for safeguarding and preserving it and to eject a trespasser and recover possession thereof for the trust; but the recovery of the property is only for and on behalf of the institution which he represents. But where a trustee has alienated the trust property and therefore would not proceed to recover possession of the same or has disabled himself otherwise from maintaining a suit in respect thereof or declines to institute a suit, it cannot be said that the institution is without a remedy. The worshippers, who are the beneficiaries entitled to participate in the benefits of the institution, are entitled to maintain a suit for preserving the trust property or restoring the property to the trust either by instituting a suit for declaration or for an injunction or even for possession; but whether the worshippers are entitled to claim all or any of the reliefs which a trustee is entitled to do in a properly framed suit would depend on the circumstances of each case. It is desirable and necessary to make the trustee a party to the suit and where he is made a party, it is open to the Court to mould the relief as the circumstances may require. If the suit is one brought for possession by the worshippers, the Court can, after declaring the property to be trust property and setting aside the alienation, direct delivery of possession to the trustee. In cases where there is no trustee, it is open to the Court to direct delivery of possession to the worshippers on behalf of the trust. (Vide *Rangaswami Naidu* v. *Krishnaswami Aiyar*[1].) Again, in certain circumstances it is competent to the worshippers to maintain an action for a declaration that a certain property is trust property and for an injunction restraining the

1. (1922) 44 M.L.J. 116.

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defendant from interfering with their right of worship, which is a personal right without making the trustee a party to the suit. This would not offend the principle that a trustee alone is competent to maintain a suit to eject a trespasser—vide *Kuvarbai* v. *Mir Alam Khan*[1] where a relief of injunction was given to worshippers in a caste temple. Applying these principles the question in this case is, is the present suit by the plaintiffs for all or any of the reliefs claimed by them maintainable? The title to the suit property is in dispute. A declaration therefore whether the property is trust property is absolutely necessary before the plaintiffs can get any other relief by way of an injunction or for possession, and the plaintiffs are entitled to claim that relief and the suit involves the granting of that relief. If the property is declared to be the trust property, the next question that arises is, whether the defendant is a trespasser and if he is, he has to be ejected from the trust property in order to safeguard the interests of the trust. Therefore that relief also the plaintiffs can claim. The fact that by reason of the institution having a trustee a Court might refuse to grant delivery of actual possession to a worshipper would not take away his right to maintain a suit for ejectment of a trespasser of trust property, where the circumstances would entitle a worshipper to claim that relief. The right of a worshipper to maintain a suit in ejectment ought not to be confused with the relief of actual possession which the Court may or may not give him. (Vide *Srinivasacharlu* v. *Subuddhi*[2].) That it is competent to a worshipper to maintain a suit in ejectment is too well established, though I have stated that the form in which the appropriate relief should be moulded, would depend upon the circumstances of the case. In *Zafaryab Ali* v. *Bakhtawar Singh*[3] a relief by way of an injunction for removal of a building was granted in respect of a mosque property. In *Muhammad Alam* v. *Akbar Husain*[4] the learned Judges cite with approval *Zafaryab Ali* v. *Bakhtawar Singh*[3] and also a passage in Ameer Ali in his work on Muhammadan Law where the learned author observes:

"Every Muhammadan who derives any benefit from a wakf or trust is entitled to maintain an action against the muthavalli to establish his rights thereto or against a trespasser to recover any portion of the wakf property which has been misappropriated".

1. (1883) I.L.R. 7 Bom. 170.
2. (1888) 23 M.L.J. 348.
3. (1883) I.L.R. 5 All. 497.
4. (1910) I.L.R. 32 All. 631.

In *Maulavi Muhammad Fahimul Huq* v. *Jagat Ballav Ghosh*[1], Mullick, J., observes thus:

"It is now settled that a beneficiary of a trust in respect of a Muhammadan wakf interested in the maintenance of a mosque or other charitable institution may, without having recourse to the provisions of r. 8, O. 1, Civil Procedure Code, and without other beneficiaries, sue for recovery of possession of property wrongfully alienated by the trustee and for the incidental declaration that the properties are the subject of the trust and that they cannot be alienated".

The same view was taken in *Ashraf Ali* v. *Mohammad Nurojjoma*[2]. So far as the cases in our High Court are concerned, the view has always been taken that it is competent to a worshipper to maintain a suit in ejectment against the alienee in possession of the trust property and direct delivery of possession of the trust property to the trustee after declaring the alienation invalid. (*Subramania Aiyar* v. *Nagarathna Naicker*[3].) The principle underlying such a suit has been that the suit is really on behalf of the trust and the worshippers must be deemed to be suing in right of the trustee as pointed out in *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar*[4] but in cases where possession cannot be awarded to the plaintiffs on the ground that there is a lawful trustee and that such a trustee has not been made a party to the suit, the suit cannot be dismissed, for other reliefs can be granted, for example, a declaration that the property is trust property—vide *Kazi Hassan* v. *Sagun Balkrishna*[5]. The cases relied on by Mr. Kuttikrishna Menon do no more than lay down that actual possession cannot be given to a worshipper if there is a duly constituted representative for the institution. (*Kamaraju* v. *Asan Ali Sheriff*[6] and *Muhammad Sahib* v. *Karim Bibi Ammal*[7].) In this case it is alleged in the written statement that the twenty-sixth defendant is the muthavalli. If he is really found to be the muthavalli, there is nothing to prevent possession on being delivered to him. It is also stated that the plaintiffs 2, 4, 5, 6 and 8 are persons in *de facto* management of the mosque and its property and if so, there is nothing to prevent the Court delivering possession to them. But if it is found that there is no muthavalli or plaintiffs 2, 4, 5, 6 and 8 are not the *de facto*

1. (1922) I.L.R. 2 Pat. 391.
2. (1918) 23 C.W.N. 115.
3. (1909) 20 M.L.J. 151.
4. (1917) 33 M.L.J. 357: I.L.R. 41 Mad. 124 at 135.
5. (1899) I.L.R. 24 Bom. 170.
6. (1900) I.L.R. 23 Mad. 99.
7. (1914) 27 M.L.J. 270.

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managers, the Court may award possession to the plaintiffs on behalf of the trust, so that when appropriate proceedings are instituted for the management of the trust property and a trustee is appointed, they may hand over possession to him. It seems to me therefore that the plaintiffs are competent to maintain this suit. The decree of the lower appellate Court is therefore set aside and the learned Subordinate Judge is directed to dispose of the other issues in the case, namely, whether the property is trust property or not; whether the twenty-sixth defendant is the muthavalli and is in possession and the management of the mosque and its property and whether plaintiffs 2, 4, 5, 6 and 8 are *de facto* managers of the mosque and its property. It is competent to him to remand the case to the lower Court for findings on the question as to who is the muthavalli and who are the *de facto* managers and dispose of the appeal after receipt of the said findings. The plaint has not been happily worded and it is partly responsible for the view which the learned Subordinate Judge took in the lower Court. In the circumstances therefore, I direct each party to bear his own costs in this appeal. The order of costs made by the lower appellate Court will stand.

Leave to appeal refused.

K. C. —— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

Gadde Venkatarayudu .. *Appellant** (*Plaintiff*)

v.

Anumolu China Ramakrishnayya and others .. *Respondents* (*Defendants*).

Venkatarayudu v. Ramakrishnayya.

Contract—Debts of vendor undertaken to be paid off with purchase price by the vendee—Transfer of documents by creditors for a lesser amount than stipulated for sale of the properties to the vendee—Vendee claiming remission amount for his own benefit—Vendee only an agent—Cannot sue for specific performance—Costs.

Where the suit properties were agreed to be sold to the plaintiff for the purpose of discharging certain debts due by the family of the defendants, but as there was some delay in completing the sale transaction, the plaintiff was requested to pay off the creditors even before the execution of the sale deed for he was assured that the amount so paid might be adjusted towards the sale price and if that plaintiff had to pay to the creditors anything in excess of the sale price, the same would be made good to him with interest, but the

*Appeal No. 258 of 1931. 14th April, 1937.

Venkata-rayudu v. Rama-krishnayya.

plaintiff's case was that though he managed to get the transfer of the documents held by the creditors on payment of a smaller amount than was actually due under them he was entitled to get the benefit of the remission given by those creditors.

Held, (1) that the lower Court was right in concluding that in making disbursements out of the agreed sale price the plaintiff was only acting as the agent of the defendants and he was not entitled to retain for his own benefit any remission that he obtained from the creditors. If a contract to the contrary were clearly established, the plaintiff might have some justification for his claim; but even the contract pleaded in the plaint would be not sufficient for this purpose because that contract was only to the effect that any excess paid by the plaintiff would be made good to him.

(2) That the lower Court's decision as to costs to be borne by plaintiff was also right, unless he was able to show that there had been any error of principle into which the lower Court had fallen in the exercise of its discretion.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada dated 8th September, 1930, and passed in O. S. No. 64 of 1927.

Ch. Raghava Rao for Appellant.

C. Sambasiva Rao for Respondents.

The judgment of the Court was delivered by

Varada-chariar, J.

Varadachariar, J.—This appeal arises out of a suit for specific performance of a contract to sell land to the plaintiff. The Court below has decreed specific performance; this appeal by the plaintiff relates to two subsidiary matters, namely, (1) his claim to an amount of Rs. 2,861-5-1 referred to in the sixth issue and (2) the order of the lower Court directing each party to bear his own costs.

The first claim arises under the following circumstances. The suit properties were agreed to be sold to the plaintiff for the purposes of discharging certain debts due by the family of the defendants, but as there was some delay in completing the sale transaction, the plaintiff was requested to pay off the creditors even before the execution of the sale deed and he was assured that the amount so paid might be adjusted towards the sale price and that, if the plaintiff had to pay to the creditors anything in excess of the sale price, the same would be made good to him with interest. It is not the plaintiff's case that he paid anything more than the sale price to the defendants' creditors. He managed to get a transfer of the document held by the creditors, on payment of a smaller amount than was actually due under those documents and he now claims that he is entitled to get the benefit of the remission given by those

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creditors. The lower Court has disallowed this part of the claim and we think its conclusion is right. In making disbursements out of the agreed sale price, the plaintiff was only acting as the agent of the defendants and he was not entitled to retain for his own benefit any remission that he obtained from the creditors. If a contract to the contrary were clearly established, the plaintiff might have some justification for this claim; but even the contract pleaded in the plaint is not sufficient for this purpose because that contract is only to the effect that any excess paid by the plaintiff would be made good to him.

As regards the lower Court's order as to costs, we do not think we will be justified in interfering with it unless the appellant is able to show that there has been any error of principle into which the lower Court has fallen in the exercise of its discretion. It is true that the plaintiff has been obliged to spend a pretty large sum in instituting this suit, but we do not find that defendants 2 and 3 ever disputed their liability to execute a sale deed. It is only the plaintiff's claim for the remission-amount that has been disputed by those defendants. We therefore find no reason for saddling them with the costs of the suit. The first defendant no doubt did raise other defences which have been found against; but as regards the first defendant's attitude, the plaintiff himself seems to be largely responsible for it. At one time, the plaintiff sided with the first defendant in his disputes with defendants 2 and 3 and gave a notice Ex. II only to defendants 2 and 3 ignoring the sale contract and asking for payment of moneys paid by him in discharge of the debts due by the defendants. The plaintiff and the first defendant fell out later and the first defendant was prosecuted and punished for fraudulent removal of documents. In this suit he has been *ex parte* both in the lower Court and here, after filing the written statement. While it cannot be said that the first defendant stands in the same position as defendants 2 and 3, we do not see sufficient reason for differing from the manner in which the lower Court has exercised its discretion in the matter of costs.

The appeal therefore fails and is dismissed with costs of respondents 2 and 3.

K. C. —— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE VARADACHARIAR AND MR. JUSTICE KING.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

Dewan Bahadur S. L. Mathias, the assessee herein residing at Mangalore .. *Respondent.*

F.B.

Commissioner of Income-tax, Madras *v.* S. L. Mathias.

Indian Income-tax Act (XI of 1922)—Assessee resident in British India—Owning coffee estates in Mysore territory—Cultivation in Mysore—Labour and materials for same sent from British India—Raw coffee brought down into British India—Payment of land tax in Mysore—Curing of seeds in British India—If assessee entitled to benefit of second proviso to S. 4, cl. (2)—Extent of exemption—Nature of curing operations—If manufacturing process—S. 2 (1), cl. (b) (ii)*—If applies.*

The assessee, a resident of British India (Mangalore), owns coffee plantations in the Mysore State for which he pays land tax to that State. He maintains an office in the Mysore territory to supervise the cultivation work there. The labour required for the cultivation is mainly recruited in Mangalore and the manure, spray materials, etc., required for the estate are purchased by the assessee at Mangalore and sent to Mysore. The harvested crops are brought to Manglore in their raw state. The assessee then gets the raw coffee cured at Mangalore by curing factories there on payment of commission to them. The cured coffee is then sold at Mangalore by P. L. & Co., the assessee's selling agents. A separate staff is maintained at Mangalore to attend to these operations.

Held, that the case falls under the second proviso to S. 4, cl. (2) and the income is "income from agriculture accruing or arising in a State in India from land for which an annual payment . . . . . is made to the State" and as such the assessee is entitled to claim the benefit of that proviso. Receipt of produce in kind is receipt or accrual of income at the place where the produce is received even within the meaning of the second proviso to S. 4 (2). Cl. (1) of S. 4 comprises 'receipts' falling under cl. (2) as well but when the facts of a case clearly bring it within the terms of the second proviso, the assessee is entitled to the benefit of the exemption.

S. 42 (3) refers only to the case of a person who sells goods purchased by him from any place outside British India and not to one who sells the produce of his own lands situate outside British India and further deals only with 'profits or gains' and not with income generally.

Kirk's case, (1900) A.C. 588, followed.

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* O. P. No. 181 of 1936. 29th April 1937.

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Commissioner of Income-tax, Madras *v.* S.L. Mathias.

Mohanpura Tea Company, Limited, In re, (1937) 5 I. T. Rep. 118 (A.N. Aiyar), dissented from.

As in the case of coffee the processes subsequent to the picking of the seeds in Mysore are not treated as in the nature of manufacture as in the case of tea but are regarded only as process 'ordinarily employed by the cultivator to render the produce fit to be taken to the market' within the meaning of S. 2 (1), clause (*b*) (ii), the assessee is entitled to claim exemption in respect of the whole income.

Case stated by the Commissioner of Income-tax, Madras, was as follows:—

The petitioner is a resident of Mangalore and is assessed by the Income-tax Officer, Mangalore. He derives income from property, business and other sources.

The case arises out of the inclusion in the assessment made on the petitioner for the year 1934-1935 (previous year: year ended 30th April, 1933) for a sum of Rs. 25,963 which the Income-tax Officer held to be the petitioner's profit of a coffee business carried on at Mangalore. The facts relating to this are the following:—

The petitioner owns two coffee estates in the Mysore State for which he pays land tax to that State. These estates are worked by the petitioner. He employs the labour required for the purpose and maintains an office in the estate in order to supervise them. The labour is recruited mainly at Mangalore and the manure, spray materials, tools, crop-bags, etc., required for the estate are purchased by the petitioner at Mangalore and are sent to the estate. The crops are harvested by the labour employed by the petitioner and are then brought to Mangalore in their raw state. There is no ready market for raw coffee. The petitioner gets the green coffee cured at Mangalore by persons owning curing factories, on payment of a commission to them. The cured coffee is insured against fire till sale and the petitioner pays the insurance charges. It is then sold at Mangalore by the petitioner's selling agents Messrs. Pierces Leslie & Co., Ltd., and the sale proceeds are realised and retained there. A separate staff is maintained at Karkal in the Mangalore District for the various operations conducted in Mangalore. The accounts are written up by the estate staff in Mysore in respect of the expenses incurred in Mysore and by the Karkal staff in respect of the expenses incurred in Mangalore and in respect of the receipts. All the operations connected with the cultivation of the coffee plants and the collection, transport and sale of produce are controlled by the petitioner from Mangalore. The result of the accounts in Mysore is incorporated in the books maintained at Karkal and a consolidated profit and loss account is made there. The income from this

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source was assessed under the head 'business' in the past. The following is an abstract of the profit and loss account for the 'previous year':—

				Rs.
Sale proceeds at Mangalore *less* value of opening stock ..				1,22,354
Deduct expenditure.	British India. Rs.		Mysore. Rs.	
Labour charges, purchase of manure, tools straw, transportation charges, Mysore land tax, etc. ..	29,179		35,954	..
Establishment charges and stationery ..	8,369		6,965	..
Curing, Selling, Fire Insurance, subscription to trade association, etc. ..	7,738		..	..
Depreciation claimed ..	..		3,377	..
	45,286		46,296	91,582
		Balance	..	30,772
Interest on borrowed Capital	..	..	10,753	
Less Inadmissible expenses added back	..	..	5,944	..
				4,809
Net profit determined by the Income-tax Officer	..	..		25,963

There is no dispute regarding the figures. The petitioner contended that he was not conducting any business in coffee and that the income derived from green coffee brought from his estate in the Mysore State was exempt from assessment under the second proviso to S. 4 (2) of the Act. The Income-tax Officer overruled these contentions and held that the income obtained by the sale at Mangalore of the green coffee cured at Mangalore constituted income from business assessable under S. 4 (1) of the Act and that therefore S. 4 (2) including its second proviso did not apply.

He accordingly included the said income (Rs. 25,963) in the petitioner's assessment and adding the income under other heads, assessed the petitioner on a total income computed at Rs. 29,160.

The petitioner appealed to the Assistant Commissioner and contended among other things which are not relevant for the purposes of this reference—

(1) that the income from the coffee estate was exempt under the proviso to S. 4 (2) of the Act, and

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(2) that if any income was assessable under S. 4 (1), it was only the residue left out of the sale proceeds after deducting the market value of the green coffee and the curing and other charges.

The Assistant Commissioner overruled these contentions for the reasons set out in his order, an extract from which is filed, marked Ex. A.

The petitioner now requires me to refer to the High Court four questions marked (1) to (4) in the application alleged to be questions of law arising out of the Assistant Commissioner's order. The petitioner's Advocate does not press questions (3) and (4) and I consider that questions (1) and (2) may be re-framed as below:

"Whether any part of the income derived by the petitioner from the produce of his coffee estates in Mysore is exempt from taxation under the second proviso to S. 4 (2) of the Indian Income-tax Act as being income that has accrued or arisen outside British India?"

The petitioner's Advocate agrees to the question as re-framed and I accordingly refer the above question for the decision of the Court.

In my opinion S. 4 (2) and its provisos have no application to the facts of this case. The sub-section renders liable to the tax income, profits or gains accruing and arising without British India, if they are received in or brought into British India. The second proviso creates an exemption from this liability and from no other. Such profit as the petitioner in this case derives from his possession of land in Mysore is derived by means of a business; and the fact that agricultural operations form an element in the business does not render it any the less a business. So far as this point is concerned the case is covered by the decision of this Court in the case of *R. S. T. Ponnuswami Pillai* v. *The Commissioner of Income-tax, Madras*[1]. It was laid down in that judgment that the business, including the agricultural processes, must be regarded as one whole. (*Cf.* on this point *Messrs. Amir Singh Sher Singh* v. *The Commissioner of Income-tax, P.N.W.F. and Delhi Provinces*[2].) The agricultural processes are not in themselves a source of income; they are merely an element in the business which produces the income. In order that the petitioner may bring himself within the exemption which he claims it is necessary for him to show that the profits of his business have accrued and arisen outside British India. I submit that he cannot do so. Not only does he reside in British India and there control the operations of his business, but those operations themselves, apart from the actual growth of the raw coffee, are performed in British India. When the raw mate-

1. (1929) 3 I.T.C. 378. 2. (1935) 8 I.T.C. 198 at 204: A.I.R. 1935 L. 361.

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rials of a business are procured by purchase, it has been held by this Court that no profit arises from the fact of purchase *Board of Revenue* v. *Madras Export Company*[1] and that:

"A trade is exercised in the place where the sales are effected and the profit thereby realised".

I submit that the same principles apply where the raw materials are not purchased, but grown. On the facts of this case, the place where the profits of his business "come home to" the petitioner is Mangalore in British India. That is his place of trade, and the place where his profits accrue and arise. I submit therefore that the income which is the subject of this reference has not accrued or arisen without British India and cannot be brought within the scope of the second proviso to S. 4 (2).

M. Patanjali Sastri and *C. S. Rama Rao Sahib* for Petitioner.

T. R. Venkatarama Sastri, M. Subbaraya Aiyar and *V. N. Kuppu Rao* for Respondent.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—The question referred to this Court for decision is whether, on the facts set out in the Commissioner's statement, any part of the income derived by the assessee from the produce of his coffee estates in Mysore is exempt from taxation under the 2nd proviso to cl. (2) of S. 4 of the Indian Income-tax Act.

The assessee who owns coffee plantations in the Mysore State is a resident of British India (Mangalore); and the case states that while he maintains an office in the Mysore territory to supervise the cultivation work there, the labour required for the cultivation is recruited in Mangalore, materials required for the estate like manure, tools, spray materials, crop-bags, etc., are purchased at Mangalore, the harvested crops are brought to Mangalore in their raw state to be dried and cleaned there in the factories of Pierce Leslie & Co., and the coffee seeds thus prepared for the market are sold there, by Pierce Leslie & Co., the selling agents of the assessee. As the sale proceeds are received and retained at Mangalore and a separate staff is maintained by the assessee at Mangalore to attend to the above operations, the Commissioner was of opinion that the assessee was liable to be taxed as one carrying on 'business' and receiving the income or profits thereof in Mangalore.

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1. (1922) I.L.R. 46 M. 360: 1 I.T.C. 194 at 200.

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As both S. 4 and S. 6 of the Indian Income-tax Act are qualified by the opening words " save as hereinafter (otherwise) provided", the point for determination is whether the assessee can claim exemption under the 2nd proviso to S. 4 (2) and, if so, to what extent. The Commissioner has expressed the opinion that proviso 2 to S. 4 (2) has no application here, because the profits of the business are received in Mangalore, and 'the agricultural processes carried on in Mysore' are not in themselves a source of income but merely ' an element in the business which produces the income'. In support of this view he has relied on the decisions in *R. S. T. Ponnuswami Pillai* v. *The Commissioner of Income-tax, Madras*[1] and *Messrs. Amir Singh-Sher Singh* v. *The Commissioner of Income-tax, P. N. W. F. and Delhi Provinces*[2], but it must be observed that even in *R. S. T. Ponnuswami Pillai* v. *The Commissioner of Income-tax, Madras,*[1] the proviso now to be interpreted did not come up and could not have come up for consideration and there can be little doubt that but for that proviso, the assessee in the present case will be liable to be assessed in respect of the profits to the extent determined by the authorities. After this reference had been made, the scope and effect of the proviso was considered by a Division Bench of the Calcutta High Court (In re *Mohanpura Tea Co., Ltd.*[3]) and the judgment is a direct authority in favour of the Commissioner's view. We have carefully considered the reasoning in that judgment but, with all respect to the learned Judges, we are unable to follow that decision.

The basis of the Calcutta decision and of the Commissioner's opinion is that when a person who owns lands outside British India sells the produce of those lands in British India, no income, profits or gains can be said to arise or accrue *until the produce is sold* and that in such cases there is accordingly no room for the application of the proviso which only relates to ' income . . . . arising or accruing in an Indian state'. The learned Judges emphasise the distinction between the *place* where the income accrues and the *source* from which it accrues and point out that the proviso is not concerned with the source. As a corollary, they think that if the sale had taken place outside British India, the income thus realised, even if subse-

1. (1929) 3 I.T.C. 378. 2. (1935) 8 I.T.C. 198 at 204: A.I.R. 1935 L. 361.
3. (1937) 5 I. T. R. 118 (A. N. Aiyar).

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quently received in British India would be exempt as income from agriculture that had arisen or accrued in the state, within the meaning of the proviso. Whatever may be said as to 'profits' or 'gains', the view that 'income from agriculture' can be said to arise or accrue only when and where the produce is sold and converted into money seems to us, with all respect, difficult to reconcile with the reasoning in *Kirk's case*[1]. Reliance was placed before us in this connection on the observation of the Judicial Committee in *Commissioner of Income-tax, Bengal* v. *Shaw, Wallace and Company*[2] that the term 'income' in the Indian Income-tax Act connotes a 'periodical monetary return' coming in with some sort of regularity or expected regularity from definite sources; but their Lordships were then laying emphasis not on the distinction between receipt in money and receipt in kind but between *recurring* receipts from a business continuously carried on and an occasional receipt of the kind then in question. On the other hand, they refer in the course of their judgment to income being likened to the 'crop of a field'. In *Commissioner of Income-tax, Bihar & Orissa* v. *Maharajadhiraj of Darbhanga*[3] the Privy Council affirms that 'a receipt in kind may be taxable income'; they only add that what is received in kind should be money's worth. It was admitted before us by Mr. Patanjali Sastri that in respect of the produce of land in British India, the Indian Income-tax Act recognises the receipt of income or rent *in kind* as receipt or accrual of income; it is difficult to see why as a matter of language, the expression 'receipt' or 'accrual' of income should not have the same significance when used in connection with the receipt of produce from lands outside India.

In *Kirk's case*[1] the question arose as to the assessment to be levied in New South Wales on a company which extracted ore from mines owned by it in New South Wales and converted it into a merchantable product there but carried the product to Victoria for sale, the sale proceeds being received either in London or in Melbourne. The Judicial Committee overruled the view taken by the New South Wales Court that:

"The income was not earned in New South Wales because the finished products were sold exclusively outside that colony".

1. (1900) A.C. 588.
2. (1932) 63 M.L.J. 124: L.R. 59 I.A. 206: I.L.R. 59 Cal. 1343 (P.C.).
3. (1933) 64 M.L.J. 612: L.R. 60 I.A. 146: I.L.R. 12 Pat. 318 at 336 (P.C.).

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Referring to several steps which had to be gone through, from the extraction of the ore to the receipt of monies on the sale of the merchantable product, their Lordships held that to the extent of two of the steps, namely, extraction of the ore from the soil and conversion thereof into a merchantable product:

> "The income was earned and arising or accruing in New South Wales".

In the Calcutta case, the learned Judges distinguish this decision as turning on the language of the particular statute and take it as only relating to the *source* from which the income accrued and not to the place where it accrued. With all respect, it seems to us that this way of distinguishing *Kirk's case*[1] fails to take note of certain portions of the argument as well as of the judgment. In the New South Wales Act, there was an exemption [S. 27 (3)] to the effect that no tax shall be payable in respect of income earned *outside* the Colony of New South Wales. On the strength of this provision, it was contended before their Lordships, on behalf of the assessee, that:

> "The income was derived from the sales, that is, from the business carried on outside the colony".

This argument they repel with the remark that it is fallacious as:

> "Leaving out of sight the initial stages and fastening attention exclusively on the final stage in the production of the income".

These relevant parts of that judgment do not seem to us to turn on any peculiarity of the New South Wales Act but to recognise that as a matter both of language and of business, receipt of produce *in kind* may well be spoken of as receipt or accrual of income at the place where the produce is received.

Mr. Patanjali Sastri had to concede that on the principle of the decision in *Kirk's case*[1], the assessee in this case might well be held by the Mysore State to have received the income within that State, but he contended that the remedy for any hardship arising from that possibility must be had by invoking the provisions of the Act relating to double taxation. We are not concerned here with any question of double taxation or hardship caused thereby; but we refer to this aspect of the matter only to point out that if for assessment in Mysore, the

1. (1900) A.C. 588.

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assessee can in the ordinary sense of words (and not by any fiction of law) be held to have received the income in Mysore, there is no reason why for purposes of the 2nd proviso to S. 4 (*2*) the income should not in this case be held to have arisen or accrued in Mysore. The decision in In re *Port Said Salt Association, Ltd.*[1], does not materially help the Referring Officer in this connection. The learned Judges recognised in that case that part of the profits might have been 'earned' elsewhere, but they held that if the whole is 'received' in British India, no portion could escape taxation unless there be a convention to limit the claim of one state against the nationals of others. The 2nd proviso is in a sense the result of such a convention; the case cannot throw light on the interpretation of the scope of that convention.

Reliance was also placed by Mr. Sastri on the observation in *Jiwan Das* v. *Commissioner of Income-tax, Punjab*[2], to the effect that the place where the sale is effected and the price realised is the principal place, if not the place, of the accrual of profits. That statement must be understood in the light of the fact that the case then under consideration related to the liability of a British Indian assessee who only purchased goods in British India but sold them outside and never received or brought the proceeds into British India. Following *Sully* v. *Attorney-General*[3] the learned Judges held that the mere purchase of goods will not amount to the carrying on of trade (except in the case provided for in S. 42) and in the circumstances there was nothing like the receipt of income or gains or profits in British India. There was no question in that case of the receipt of produce from one's own estate; but the way the learned Judges deal with *Kirk's case*[4] shows that if the facts before them had been similar to those in *Kirk's case*[4] or to those in the present, they would have held that the receipt of the produce would amount to receipt of income.

Accepting our interpretation of the decision in *Kirk's case*[4], Mr. Patanjali Sastri advanced an alternative argument. Assuming that the income might be held to have 'accrued' or 'arisen' to the assessee in Mysore, he maintained that it might nevertheless be held to have been 'received' by the assessee in

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1. (1932) I.L.R. 59 Cal. 1226.
2. (1929) I.L.R. 10 L. 657: 4 I.T.C. 40.
3. (1860) 2 T.C. 149.
4. (1900) A.C. 588.

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British India not merely within the meaning of cl. (2) of S. 4 but even within the meaning of the first part of cl. (1). The purpose of this argument was in any event to exclude the operation of the second proviso which is worded as a proviso only to sub-S. (2) and not to sub-S. (1). The first clause deals with two kinds of receipt in British India; one, receipt in the ordinary sense of that word and the other, in an artificial or extended sense and the second clause defines the artificial or extended meaning. If the second proviso qualifies only this 'artificial' sense of receipt, it would have no operation in cases where the receipt of income in British India can be held to amount to 'receipt' in its natural or ordinary sense. In support of the contention that income may 'accrue' or 'arise' in one place and yet be held to have been 'received' in another place, he relied on the decision of the Judicial Committee in *The Pondicherry Railway Company* v. *Commissioner of Income-tax, Madras*[1].

We may observe at the outset that in *The Pondicherry Railway Co.* v. *Commissioner of Income-tax, Madras*,[1] their Lordships were not called upon to decide whether the 'receipt' of income by the company was a receipt in the grammatical sense or in the extended or artificial sense, because the company's contention was that there was no receipt at all by or on their behalf in British India and that they received the income only in London. If that decision gives us any guidance at all in the present case, it may well be held that on the facts here, the receipt of the produce in Mysore itself by the assessee's men on the spot will correspond to the receipt by Mr. Rothera in the *Pondicherry Company case* and the assessee's receipt of the income in British India can only be a receipt in the secondary stage, just like the receipt by any Nattukottai Chetty here of profits earned by a business carried on on his behalf in foreign countries. Even apart from this view of the facts, it does not seem to us necessary or reasonable to read cls. (1) and (2) of S. 4 as mutually exclusive. The first clause comprises 'receipts' falling under the 2nd clause as well, and when the facts of a case clearly bring it within the terms of the 2nd proviso, it is obviously a case which on grounds of policy the legislature intended to exempt and it does not seem to us right to deprive the subject of this exemp-

1. (1931) 61 M.L.J. 251: L.R. 58 I.A. 239: I.L.R. 54 Mad. 691 (P.C.).

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tion by holding that the 'receipt' in British India is in the primary sense and not in the secondary sense, especially when the 2nd clause as well as the 2nd proviso speak only of 'accruing' or 'arising' outside British India and not also of being 'received' outside British India. There can be no doubt that in this case the income 'accrued or arose' without British India and was 'received or brought into British India'. We would give the same answer to the argument founded on cl. (3) of S. 42 which provides for the taxability in British India of profits or gains from the sale in British India of merchandise exported to British India from outside. Reading the clause as a whole, it is evident that it refers to a person who sells goods purchased by him and not to one who sells the produce of his own lands. It is significant that the clause deals only with 'profits' or 'gains' and not with income generally.

The circumstances in which the 2nd proviso came to be inserted do not suggest any intention to make the kind of differentiation now insisted on by the Referring Officer. Prior to 1933, it was only 'profits or gains of business' outside British India that were taxed when brought into British India. The amending Bill of 1932 sought to make *all income* (not merely profits from business) accrued outside British India taxable if and when brought into British India: the Bill therefore sought to amend only cl. (2) of S. 4. The kind of income exempted by the 2nd proviso is undoubtedly *foreign* income and when the Legislature resolved to exempt foreign income of the particular kind dealt with in that proviso, it seems to have been thought sufficient to enact the exemption as a proviso to the 2nd clause which was then being amended for the very purpose of including 'foreign income' generally. We are accordingly of opinion that the assessee in this case is entitled to claim the benefit of the 2nd proviso to S. 4 (2).

It remains to determine the extent of the exemption which the assessee can claim. It was contended on his behalf that the whole of the price realised by him by the sale of the Mysore Coffee in Mangalore should be excluded, but it was maintained on behalf of the Referring Officer that the assessee is at best only entitled to a deduction of the value of the coffee beans in a raw state in Mysore. The statement of the Commissioner and an affidavit of Mr. Kirkbride, Manager of Pierce

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Leslie & Co., set out in detail what happens to the beans between the time when they are picked and the time they are actually sold. If the processes subsequent to the picking can be regarded as in the nature of *manufacture*, the assessee will on the analogy of the rule applicable to tea (see *Killing Valley Tea Company, Ltd.* v. *The Secretary of State for India*[1] and r. 24 of the rules framed under S. 59 of the Act), be entitled to deduct only the agricultural part of the income. But the affidavit states that in the case of coffee, the process is not in the nature of a 'manufacturing' process but only a process 'ordinarily' employed by the cultivator to render the produce fit to be taken to the market [*See* S. 2 (1) (*b*) (*ii*)]. The learned counsel appearing for the assessee definitely asserted that in respect of coffee grown on assessed lands in British India, this is the view adopted in practice by the Income-tax authorities and we have been shown nothing to the contrary. We have accordingly come to the conclusion that if the assessee can claim to be treated as on the same footing with one selling coffee grown on one's own land in British India, he is entitled to exemption in respect of the whole price realised by the sale of his coffee. This leads us to the consideration of the question whether the exemption under the 2nd proviso to S. 4 (2) is of the same scope as the exemption applicable to 'agricultural income' as defined in S. 2 (1) of the Act.

Mr. Patanjali Sastri is certainly right in his contention that the statutory definition of 'agricultural income' does not in terms apply to cases falling within the proviso now in question. If the definition in the Act is one which is intended to include what will not otherwise be ordinarily comprehended in the meaning of the expression 'agricultural income', the assessee in the present case cannot claim the benefit of the full scope of the definition because it applies only to income derived from lands in British India. But we are inclined to agree with the learned counsel for the assessee that the statutory definition involves no artificial extension but merely embodies the significance attaching in a business sense to the word 'income' when applied to agriculture. As pointed out by Rowlatt, J., in *Back* v. *Daniels*[2] if a farmer is entitled to sell his produce in the village he is equally entitled to take it to a market town and it

1. (1920) I.L.R. 48 Cal. 161. 2. (1924) 2 K.B. 432.

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cannot be said that he is 'commencing a new business from the time when he took his crops from the farm on the way to market'. The same principle must apply to what he may do to make it fit for the market unless it involves such a distinct process as to justify its being regarded as in the nature of a manufacturing process. In the Court of appeal, Scrutton, L.J., took the view that even if cultivation of land to grow produce for the purpose of sale is to be regarded as a trade, the state, by its separate system of taxing land, may reasonably be taken not to have intended to deal with it as a trade. (*Back* v. *Daniels*[1].) Mr. Sastri pointed out that our conclusion would practically amount to reading the proviso in S. 4 into the definition of 'agricultural income' when the legislature had not (as it might well have done) included in that definition income from assessed lands in Indian States. Having regard to the manner in which amendments have been from time to time inserted in the Act, the argument founded on the particular place where an amendment is inserted cannot have the same force here as in the case of a provision which formed part of the original scheme of the Act. As we have already explained, S. 4 (2) might well have been thought to be the proper place for the insertion of the proviso. On the other hand, we have not been shown any reason why the proviso was inserted at all and why it should have been limited to lands paying assessment to an Indian State if it was not the intention to treat the owners of such lands as on the same footing as owners of assessed lands in British India. The policy clearly was to avoid double taxation; not double taxation in the sense of payment of income-tax in two places but of taxing a person who in respect of the same subject-matter has already paid reasonably heavy land tax, whether in British India or in an Indian State.

Our answer to the question referred is that the whole income derived by the assessee by the sale in Mangalore of the produce of his coffee estates in Mysore is exempt from taxation. The assessee will be entitled to Rs. 250 for his costs and also to refund of the deposit of Rs. 100.

S. V. V. —— *Reference answered.*

1. (1925) 1 K.B. 526 at 543.

PRIVY COUNCIL.

[On appeal from the Court of the Honourable the Resident at Hyderabad, Deccan.]

PRESENT:—LORD THANKERTON, LORD NORMAND AND SIR SHADI LAL.

Fakira and others .. *Appellants**

v.

The King-Emperor .. *Respondent.*

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Fakira *v.* King-Emperor.

Criminal trial—Administered areas—Notification of Governor-General under Indian Foreign Jurisdiction Order in Council, 1902—Extension of S. 268, Criminal Procedure Code, 1898, with modifications—Discretion conferred on Sessions Judge to dispense with jury and aid of assessors—Assistant Sessions Judge whether entitled to same power—Criminal Procedure Code, 1898, as amended, Ss. 288 and 374 to 379—Statement before Magistrate admitted by Sessions Judge under S. 288—Deposition whether available merely for cross-examination purposes—Order of confirmation of sentence of death—Court of Resident of Hyderabad consisting of two Judges—Order made and signed only by one—Validity of order.

Where by notification in exercise of the powers conferred by the Indian Foreign Jurisdiction Order in Council, 1902, the Governor-General applied the Indian Penal Code, and the Criminal Procedure Code, to certain Administered Areas, and S. 268 of the Criminal Procedure Code, which provides that all trials before a Court of Session shall be either by jury or with the aid of assessors, was thereby applied subject to the modification that "trials before Court of Session shall be either by jury or with the aid of assessors",

Held, that the discretionary power of dispensing with a jury and aid of assessors was conferred not only on the Sessions Judge but also on the Additional Sessions Judge.

When the Sessions Judge in exercise of the discretion conferred upon him by S. 288, Criminal Procedure Code, admits the deposition of a witness before the committing Magistrate as evidence, the deposition is to be treated as evidence in the case for all purposes and not merely for the purpose of cross-examination under S. 155 of the Indian Evidence Act. The words "subject to the provisions of the Indian Evidence Act, 1872," in S. 288 cannot be read so as to limit the purposes for which the deposition may be used.

The new sentence or order referred to in S. 377 of the Criminal Procedure Code, as amended, refers to the powers of variation of the sentence, etc., conferred by S. 376 of the Code. Where the Court of the Resident consists of two Judges and the order of confirmation is made and signed only by one of them the peremptory provisions of S. 377 are not complied with and there is no valid confirmation. Case remitted for disposal under Ss. 375 to 379 of the Criminal Procedure Code.

Decision of the Court of the Resident at Hyderabad modified in part.

Appeal by special leave from a judgment and order of the Court of the Resident at Hyderabad dated 17th January, 1936,

* P. C. Appeal No. 99 of 1936. 23rd February, 1937.

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which affirmed the convictions and sentences passed upon the appellants by the Additional Sessions Judge at Secunderabad dated 28th November, 1935.

P. V. Subba Row for Appellants.

Dunne, K.C. and *Wallach* for the Crown.

23rd February, 1937. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—This is an appeal by special leave from a judgment and order of the Court of the Resident at Hyderabad, dated the 17th January, 1936, which affirmed the convictions and sentences passed upon the appellants by the Additional Sessions Judge of Secunderabad by his judgment dated the 28th November, 1935.

The appellants and another were tried by the Additional Sessions Judge, sitting without jury or aid of assessors. The learned Judge convicted the appellant Fakira of offences punishable under Ss. 148 and 302 of the Indian Penal Code, and sentenced him to two years' rigorous imprisonment under S. 148 and to death under S. 302. The appellant Shankar was convicted under S. 148, and was sentenced to two and a half years' rigorous imprisonment and to pay a fine of Rs. 200 and in default to suffer four months' rigorous imprisonment. The appellant Kunnay Lingayya was convicted under S. 147, and was sentenced to 18 months' rigorous imprisonment and to pay a fine of Rs. 200 and in default to suffer four months' rigorous imprisonment. The appellant Narahari was convicted under S. 148, and was sentenced to two years' rigorous imprisonment and to pay a fine of Rs. 100 and in default to suffer rigorous imprisonment for two months.

From these convictions the appellants appealed to the Court of the Resident at Hyderabad, and the case was also referred by the Additional Sessions Judge under S. 374 of the Code of Criminal Procedure for the confirmation of the death sentence passed on Fakira. The appeal was heard by the Additional Judge of the Court of the Resident, who, on the 17th January, 1936, dismissed the appeals and affirmed the sentences, and passed a separate order affirming the sentence of death on the appellant Fakira.

On the 1st February, 1936, on an appeal for mercy by the appellant Fakira, the Resident at Hyderabad, under S. 401 of the Criminal Procedure Code, commuted the sentence of death to one of 10 years' rigorous imprisonment.

Three contentions were submitted by counsel for the appellants, one of which applied only to the case of the appellant Fakira.

The occurrence which gave rise to the prosecution out of which this appeal arises took place in Secunderabad within the Administered Areas in the Hyderabad State. By Notification No. 260-1, dated the 24th April, 1929, in exercise of powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902, the Governor-General applied *inter alia* the Indian Penal Code and the Indian Code of Criminal Procedure to these Administered Areas, with certain modifications, which included a provision that references to the Local Government should be read as referring to the Resident at Hyderabad, and references to the High Court should be read as referring to the Court of the Resident at Hyderabad. Further, S. 268 of the Criminal Procedure Code, which provides that all trials before a Court of Session shall be either by jury or with the aid of assessors, was applied subject to the modification that "trials before a Court of Session may, in the discretion of the Sessions Judge, be without jury or aid of assessors".

The Court of the Resident at Hyderabad consists of the Resident and an Additional Judge. The Cantonment of Secunderabad is a Sessions Division, the Court of Session consisting of a Sessions Judge and an Additional Sessions Judge.

In the first place, the appellants maintain that the discretionary power of dispensing with a jury and aid of assessors is conferred only upon the Sessions Judge and not upon an Additional Sessions Judge, and sought to support the contention by reference to a number of sections of the Criminal Procedure Code. The Resident has the power under S. 9 (3) to appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more Courts of Session. This clearly means the exercise of jurisdiction as a Sessions Judge, and the later provisions as to the arrangement of business and as to the cases to be tried by them [Ss. 17 (3) and (4), and 31 (2)] do not affect their jurisdiction as a Sessions Judge in any case allotted or made over to them. S. 31 (3) does contain an express limitation of the power of an Assistant Sessions Judge in the matter of sentences. The provisions as to appeal in Ss. 408, 409 and 410 do not affect

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the question of jurisdiction at the trial, and S. 438 as to powers in cases of reference or revision of decisions of a lower Court is equally irrelevant. Their Lordships are of opinion that the Additional Sessions Judge was entitled to exercise his discretion under S. 268 of the Criminal Procedure Code.

In the second place, the appellants submitted that the Additional Judge of the Court of the Resident, on the appeal, had erred in founding his conclusions on the view that the evidence of an eye-witness, Vasanta Rao, was corroborated in certain particulars by the evidence of a witness, Srinivasa Rao, and that this error vitiated his judgment.

During the night of the 24th August, 1935, a Hindu-Muhammadan riot took place at Secunderabad, during which a Muhammadan, Muhammad Ismail, was killed. The case for the prosecution was that when the deceased was proceeding on his bicycle towards his home on that evening and was passing the house of the appellant Kunnay Lingayya he was attacked by the appellant Shankar with a lathi, whereupon he fell off his bicycle and getting up ran towards the east, whereupon he was surrounded by about 15 persons, including the appellants and struck twice on the head by the appellant Fakira with a lathi. The result was that he fell back unconscious and never regained consciousness, but died about 12 hours after the attack.

The witness Vasanta gave evidence which, if believed, justified the conviction of all the appellants. His credibility was attacked and was discussed by the Trial Judge, who, nevertheless, accepted his story as true in essential particulars. The Trial Judge also took into account the evidence of the witness Srinivasa; the learned Judge says:—

"The principal feature of the evidence of Srinivasa in this Court is that whereas he has to a considerable extent given the same evidence as in the committing Magistrate's Court until the stage when accused 2 (Shankar) struck the Muhammadan coming on the cycle, he has declined to depose that accused 2 struck the Muhammadan with a lathi on his back, as a result of which the Muhammadan fell off the cycle, whereupon the Muhammadan left his cycle and ran in the direction from which he had come and the Hindus ran after him and surrounded him and that while accused 2 stood where he was and struck the cycle with a lathi he saw the Muhammadan surrounded near the toddy shop and being beaten after which he was frightened and went away; and on the other hand he has deposed as follows: 'A Muhammadan boy was coming on a cycle. The 50 persons that were there all of them surrounded him. I got afraid and I went away. I do not know anything more, it was dark and as there were about 50 people I was not able to make

out any.' The principal result of his evidence is that he does not implicate accused 2 at all which he had previously done and that he does not say that the Muhammadan was beaten after being surrounded."

The Trial Judge had taken the view that this witness had obviously been tampered with, and, in exercise of the discretion conferred upon him by S. 288 of the Criminal Procedure Code, had admitted his deposition before the committing Magistrate as evidence.

The appellants did not suggest that the Trial Judge had made any such error as to the evidence of this witness as they impute to the Additional Judge of the Court of the Resident. The only objection taken by them was to maintain that the deposition, when admitted under S. 288, could only be used for the purpose of cross-examination within the provisions of S. 155 of the Indian Evidence Act. But this contention is clearly untenable in view of the express provision of S. 288 of the Code that it is to be treated as evidence in the case for all purposes; the words "subject to the provisions of the Indian Evidence Act, 1872," cannot be read so as to limit the purposes for which it may be used.

This Board, as has been so often said, does not act as a Court of review of the decisions of a Court of Criminal Appeal, unless it can be shown that the error has led to injustice of a grave character. In the present case, their Lordships find no room for suggestion of any such injustice. As already stated, the appellants, apart from the untenable contention as to the use of the deposition of Srinivasa, made no suggestion of error on the part of the Trial Judge, and their Lordships are satisfied that the Trial Judge, in the view that he took of the credibility of Vasanta, whom he heard and saw, along with the evidence and deposition of Srinivasa, was entitled to find the case proved against the appellants. Their Lordships therefore declined to examine the suggestion of error on the part of the Additional Judge of the Court of the Resident. Accordingly this ground of appeal fails.

There remains the third ground of appeal, which affects only the appellant Fakira. Ss. 374 and 377 of the Criminal Procedure Code as modified provide as follows:—

"374. When the Court of Session passes sentence of death, the proceedings shall be submitted to the Court of the Resident at Hyderabad and the sentence shall not be executed unless it is confirmed by the Court of the Resident at Hyderabad.

P.C.
Fakira v. King-Emperor.
Lord Thankerton.

"377. In every case so submitted, the confirmation of the sentence or order passed by the Court of the Resident at Hyderabad shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them."

The new sentence or order referred to in S. 377 refers to the powers of variation of the sentence, etc., conferred by S. 376.

It is plain, as the Court of the Resident consists of two Judges, and the order of confirmation was only made, passed and signed by one of them, that the peremptory provisions of S. 377 have not been complied with, and counsel for the respondent felt unable to resist this conclusion. It follows that the sentence of death passed by the Court of Session on the appellant Fakira has not been validly confirmed, and that it remains submitted to the Court of the Resident, who will require to dispose of the same under Ss. 375 to 379 of the Criminal Procedure Code, and who should take into account, when considering their action under the alternative powers of S. 376, their Lordships' views on the other contentions in this appeal and the commutation of sentence made by the Resident in February, 1936.

Their Lordships will accordingly humbly advise His Majesty that the appeals of the appellant Shankar, Kunnay Lingayya and Narahari should be dismissed and that the judgment and order of the Court of the Resident, so far as applicable to these appellants, should be affirmed; that the appeal of the appellant Fakira should be allowed, and the judgment and order of the Court of the Resident, so far as applicable to this appellant, should be set aside, and the case should be sent back to the Court of the Resident in order that the sentence of death on the said appellant submitted to them for confirmation by the Sessions Court of Secunderabad may be disposed of by them in terms of Ss. 375 to 379 of the Criminal Procedure Code.

Solicitors for Appellants: *G. K. Kannepalli.*

Solicitors for the Crown: *Solicitor, India Office.*

R. C. C. *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE HORWILL.

K. G. Ponnappa Nadar and another .. *Appellants** *(Defendants and Nil)*

v.

Thenazhi Parakkalati and others .. *Respondents (Plaintiff and Nil).*

Ponnappa Nadar *v.* Parakkalati.

Bailor and bailee—Bailment of an elephant—Hire for one year—Death in the interval—Onus of proving negligence—Difference between bailment of animals and goods—Evidence Act, S. 106—Facts within bailee's knowledge—Duty to place before Court—Contract Act, S. 161—Applies only to loss after period of bailment.

The defendant took an elephant on hire from the plaintiff for one year from 13th March, 1927 and sent it to the forest for timber-hauling. On 8th October, 1927, that is, before the expiry of the year of hire, the elephant died in the forest. Thereupon the plaintiff, brought an action for damages alleging that the elephant died, owing to the defendant's negligence by overwork and underfeeding. But the defendant pleaded that it died a natural death due to heart-failure.

Held, that the general rule that a person who alleges negligence must prove it applies whether the action is on a contract or in tort and an action between bailor and bailee is ordinarily no exception to it. Where the nature and circumstances of the loss of the article bailed are by themselves such as to suggest negligence, the onus may shift on to the bailee, by the application of the principle of *res ipsa loquitur,* to prove that the loss was not due to his negligence. Where as here the bailed article is an animal, which is liable to natural diseases and death, it cannot be said that the mere fact of death is *prima facie* proof of negligence on the bailee's part, and it is not incumbent on him to prove a negative case that he was not negligent.

But as the facts leading to the death of the animal bailed are matters peculiarly within the knowledge of the bailee, there is a duty cast on him under S. 106 of the Evidence Act to put forward a reasonable explanation for the death and place before the Court frankly all the material within his peculiar knowledge and possession that would give the Court some idea of the condition of the animal, the work done by it during the period it was with him etc.

S. 161 of the Contract Act only deals with the case of loss of bailed articles after the expiry of the period of bailment, when the liability of the hirer will be heavier.

Dwarkanath v. *The Rivers Steam Navigation Company, Ltd.,* (1917) 27 C.L.J. 615 (P.C.), applied.

Appeal against the decree of the Court of the Subordinate Judge of Ottapalam (South Malabar) in O. S. No. 18 of 1928.

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* Appeal No. 242 of 1930. 7th October, 1936.

Ponnappa Nadar *v.* Parakkalati.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *C. S. Swaminathan* for Appellants.

T. M. Krishnaswami Aiyar and *P. Govinda Menon* for Respondents.

The Court delivered the following

Varadachariar, J.

JUDGMENTS: *Varadachariar, J.*—The material facts have been set out in my learned brother's judgment and I need not re-state them. The paucity of reliable evidence in the case has compelled us to base our decision almost wholly on our view as to the burden of proof; and as the question was argued before us at some length, I have thought it right to make a few observations on that point.

The lower Court has dealt with the case on the footing that:

> "The burden of proving that the elephant died when in the possession of the defendant, notwithstanding the exercise of that care which in law he was bound to take, is upon him".

On behalf of the appellant, the learned Advocate-General argued that an action between bailor and bailee was no exception to the general rule that the party seeking to recover compensation must make out that the party against whom he complains was in the wrong. On the other hand, Mr. T. M. Krishnaswami Iyer (the learned counsel for the respondents), maintained that as a bailee, the defendant was under an obligation to restore the thing bailed at the termination of the bailment and it is for him to excuse himself by proper reasons, if he is unable to restore the thing bailed. Stated in the above simple form, both the propositions are true enough; but in their practical application, they have to be modified in the light of other principles coming into play in varying circumstances. Even after allowing for the interaction of different principles according to circumstances, it is by no means easy to reconcile the dicta found in numerous cases on this question of burden of proof.

Story in his 'Law of Bailments' noticed these discrepancies in the authorities (*see* S. 410). The learned editor in the 8th edition of that work attempted a reconciliation of the authorities in an elaborate footnote but the editor of the 9th edition felt that the authorities were not easily reconcilable and pointed to a difference in the trend of decisions between the

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English and the American Courts. In *Coldman* v. *Hill*[1] Bankes, L.J., draws attention to the difference in the points to be proved, according as the bailor brings an action of detinue or of trover or on the case for negligence (*see* Story, para. 213). This classification may, to some extent, help to reconcile apparently divergent dicta. If the action was one of detinue it was well established that a bailee who was unable to restore the bailed goods would not be permitted to plead his negligence any more than his wrongful act in justification of his inability (*Reeve* v. *Palmer*[2]). In the absence of explanation by the bailee, the loss was taken to be the result of want of due care and attention. (*See also* Story on Bailments, para. 278.)

Even when the action is one based on negligence, there are observations to be found in the judgments of eminent judges suggesting that the onus lies on the bailee to disprove negligence. In *Gosse Millard* v. *Canadian Government Merchant Marine, Limited*,[3] there is a dictum quoted by Wright, J., from the judgment of Atkin, L.J., in *The Ruapehu*[4] to the effect:

> "That it is wrong to say that the onus on the bailee to prove absence of negligence does not arise until the bailor has first shown some negligence on the part of the bailee."

As the report is not available to me, I have not been able to examine the context in which the above observation of the learned Lord Justice occurs. On the other hand, the learned Advocate-General contended before us on the authority of *Wakelin* v. *London and South Western Railway Company*[5] that it is not sufficient for the plaintiff merely to prove negligence on the part of the defendant but he must also prove that that negligence caused or materially contributed to the injury complained of. This last proposition does not however seem applicable as between bailor and bailee, in view of the decision of the House of Lords in *Morison* v. *Walton* (unreported) referred to and followed in *Joseph Travers and Sons, Limited* v. *Cooper*[6] and *Coldman* v. *Hill*[1]. These authorities seem to establish that in cases in which negligence or breach of duty on the part of the bailee is established, the onus lies on the bailee to show that the negligence or default did not cause the

1. (1919) 1 K.B. 443.
2. (1858) 141 E.R. 33.
3. (1927) 2 K.B. 432 at 436.
4. (1925) 21 L.I.L.Rep. 310.
5. (1886) 12 A.C. 41.
6. (1915) 1 K.B. 73.

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loss. On this point, the Court of appeal in *Joseph Travers and Sons, Limited* v. *Cooper*[1] reversed the judgment of Pickford, J.

As to the extent of the *initial* burden lying on the plaintiff, even the recent authorities are not precise or uniform. The observation of Lord Halsbury in *Morison* v. *Walton* (as quoted in *Joseph Travers and Sons, Limited* v. *Cooper*[1]) is couched in very broad and general terms:—

"The bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him".

(similar language is used by Buckley, L.J., on the same page). The observations of Lord Loreburn in the unreported case are however qualified by reference to the circumstances of the case. The learned Advocate-General drew our attention to the observations of the Judicial Committee in *Dwarkanath* v. *The Rivers Steam Navigation Company, Limited*[2], where their Lordships say that the learned trial Judge was wrong in holding:

"That it was incumbent upon the defendant company to satisfy him that they had taken such care of the goods as a man of ordinary prudence would take of his own goods".

Referring to S. 106 of the Evidence Act, their Lordships add:

"It was therefore right that the defendant company should call the material witnesses who are on the spot (as it seems to have done); but this provision of the law of evidence does not discharge the plaintiffs from proving the want of due diligence or (expressing it otherwise) the negligence of the servants of the defendant company. It may be for the company to lay the materials before the Court, but it remains for the plaintiffs to satisfy the Court that the true inference from those materials is that the servants of the defendant company have not shown due care, skill and nerve".

See also *Dekhari Tea Co., Ltd.* v. *Assam Bengal Railway Co., Ltd.*[3].

The above statement of the law by the Judicial Committee is binding upon us and as we have come to the conclusion that even judged by this test, the appellant has not discharged the obligation laid on him by S. 106 of the Evidence Act, it is not necessary for us to examine the other cases to which Mr. Krishnaswami Aiyar drew our attention. He suggested that as this judgment of the Board was delivered by Sir Walter Phillimore, the observations occurring in this judgment must be interpreted in the light of the decision of the Court of Appeal

1. (1915) 1 K.B. 73. 2. (1917) 27 C.L.J. 615 at 619 (P.C.).
3. (1919) I.L.R. 47 Cal. 6 at 25.

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in *Joseph Travers and Sons, Limited* v. *Cooper*[1] to which also Sir Walter Phillimore was a party. But the judgment of Phillimore, L. J., in that case deals not with the *initial* onus but with a later stage. On p. 97, he observed that:

> "When the bailee of goods has to admit that the goods have been damaged while in his custody and in the absence of the custodian, and it is found that the absence was improper and negligent and that that very absence makes it difficult to determine what was the cause of the damage, and the owner can suggest a probable cause which the presence of the custodian might have prevented, the burden is upon the bailee to show that it was not the negligent absence which was the cause of the damage".

Dealing with the English authorities generally, I may observe that they all purport to be based on the judgment of the Exchequer Chamber in *Scott* v. *London and St. Katherine Docks Company*[2] and the very first proposition there stated is 'there must be reasonable evidence of negligence'. The Court however went on to add that:

> "Where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care".

See also *The Kite*[3] and Beven on Negligence, 4th Edition, p. 971. As pointed out in Beven on Negligence, Chapter III, the application of the principle *res ipsa loquitur* will explain why in several cases the burden is cast on the defendant almost from the beginning. In the application of this maxim, there is a difference between animals and goods; because, in the case of the latter, they have no power of motion in themselves and the very fact of motion, disappearance or loss argues negligence in the bailee (*see* Beven on Negligence, 4th Edition, Vol. I, p. 124 and Story on Bailments, para. 406). This distinction was recognised by the Privy Council in *Moffatt* v. *Bateman*[4], though in a different connection. This distinction must be borne in mind when the Court is called upon to presume that the death of an animal *must* be the result of negligence on the part of the bailee. [*Cf.* the authorities noticed in Beven on Negligence (Vol. II), pages 972, 973.]

Kush Kanta v. *Chandra Kanta*[5] is not really analogous to the present case. There is no doubt a general observation on

1. (1915) 1 K.B. 73.
2. (1865) 159 E.R. 665 (3 H. & C. 596).
3. (1933) Probate 154 at 169, 170.
4. (1869) L.R. 3 P.C. 115 at 122.
5. (1923) 83 I.C. 151.

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p. 154 that on proof of loss of the thing bailed:

"The law presumes negligence to be the cause and casts upon the bailee the burden to show that the loss is due to causes consistent with due care on his part".

This observation must be understood in the light of the authorities above referred to. The actual decision rests on S. 161 of the Contract Act, because the animal hired was not returned at the proper time and died when in the custody of the hirer *after* he had made default. That the liability of the hirer in such circumstances is heavier will be seen from the discussion in paras. 413 (*c*) and (*d*) of Story on Bailment. *See also* Beven on Negligence, p. 970 and *Secretary of State* v. *Kesho Prasad*[1].

It only remains to add a word of caution in respect of the use of observations found in judgments relating to the liability of railway companies. In India, actions against these companies have to be dealt with in the light of the provision expressly enacted in S. 76 of the Indian Railways Act that:

"It shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused".

Even when such actions have to be decided on general principles (especially in cases of torts) the Court has to proceed on the footing that as these Companies Act under statutory authority, they cannot be called upon to observe precautions which the legislature has not thought fit to enjoin (*Wakelin* v. *London and South Western Railway Company*[2]).

On the facts, I concur in the opinion expressed by my learned brother as to the nature and effect of the evidence in the case. I only wish to add that Mr. T. M. Krishnaswami Aiyar rightly laid stress upon the omission of the defendant to produce the accounts which D.W. 5 swore he kept, because, according to his own evidence, those books would show when and for how many days the elephant worked, when and for how many days it did not work and when and for what purpose D.W. 6 was called in. The information gatherable from the account books under the above heads would have a very important bearing on at least three of the points material to the case, namely, the complaint of over-working, that is, working the animal for more than twenty days in the month as provided for in Ex. A, the possibility of the animal having been unable

1. A.I.R. 1932 All. 584.
2. (1886) 12 A.C. 41 at 46.

to work on account of illness for sometime before its death, and the truth of the story of D.W. 6 having been paid for conducting a *post mortem* examination. This omission seems to me sufficient even by itself to warrant the conclusion that the defendant has not discharged the duty imposed on him by S. 106 of the Evidence Act. He cannot in the circumstances take shelter under the argument that the plaintiff did not summon him to produce the account books, because under S. 106 the duty of full disclosure lies on the defendant. The importance of the books was sufficiently stressed by plaintiff's counsel during the course of the cross-examination of D.W. 5, and the defendant, if only he so chose, had ample time to cause the production of the books before the case closed.

I must refer to another circumstance on which also Mr. Krishnaswami Aiyar was, in my opinion, justified in relying, namely, the haste with which the carcass was buried. (*See* the observations in Beven on Negligence, Vol. I on page 134 with reference to *Rooney* v. *Allans.*) It is not disputed that it was buried on the evening of the 8th October itself. It is not as if there was any particular necessity for such haste as the animal died in a forest and not in the vicinity of a town. Defendant's witnesses admit that they had not even obtained the usual written permission of the state authorities before burying it in a portion of the reserved forest. It not being the defendant's case that the plaintiff could have had any other information as to the animal's illness or death than that conveyed by the telegrams F and F-1, it would have been reasonable in the circumstances that the defendant's men should have given the plaintiff an opportunity of inspecting the animal at least after its death so as to satisfy himself that there had been nothing wrong on the part of the defendant's men. Defendant and his witnesses realised the force of such an argument and they accordingly state that a man sent by the plaintiff reached the forest before the evening (before the *post mortem* was completed) and satisfied himself that the animal died of heart disease. They would have it that the telegrams F and F-1 which were addressed to the defendant at Olavakkot were sent on by him to the plaintiff (who was living several miles away) early enough on the 8th noon to enable him to send a man to reach the forest before the evening; but in view of the hours noted on the telegrams,

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the distances to be covered, and the means of communication available, I am not prepared to accept this story. It seems more probable that the plaintiff's man was able to reach the spot only on the next day as the plaintiff swears. The learned Advocate-General commented upon the omission of the plaintiff to examine the individual whom the defendant's witnesses named as the person that was present on the plaintiff's behalf at the *post mortem*. But here again Mr. Krishnaswami Iyer points out that if, as D.W. 5 swears, his account books will contain entries relating to amounts paid by him for the expenses of plaintiff's man who is said to have come to the forest on the 8th evening, the production of those books would have been the best way of disproving the plaintiff's version.

I agree that the appeal must be dismissed, except for the small modification in the form of the decree. I also concur in the order proposed by my learned brother as to the costs of the appeal.

Horwill, J.

Horwill, J.—By the written contract Ex. A dated 12th March, 1927, the defendant took an elephant on hire from the plaintiff, for one year from 13th March, 1927 and sent it to the forest for timber hauling. A few days later one of the mahouts, Narayanan Nayar, sent with the elephant, left. In September, so the learned Subordinate Judge finds, the other mahout Velayudhan Chetty left. On 8th October, 1927, the elephant died. The plaintiff's case is that the elephant was grossly underfed and overworked and had lost its life on that account. The defendant on the other hand contends that after the plaintiff's mahouts left he was unable to find any man who was able to manage the elephant; for it was of bad temper and got excited at the presence of strangers. He alleges that on 6th October, 1927, the animal died suddenly of heart failure.

The Subordinate Judge of Ottapalam seemed disinclined to accept the plaintiff's story that the elephant died of overwork but found that it had died of exposure to the heavy monsoon rains. He was of opinion that the burden of proving how the animal had died rested on the defendant as bailee and he not having put forward a satisfactory account of the animal's death, the suit was decreed. Hence this appeal by the defendant.

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It is not necessary to refer to the numerous cases which lay down the common law principle that a person who alleges negligence must prove it; for we do not think that Mr. T. M. Krishnaswami Aiyar for the defendant would deny that in general the principle holds good. This principle applies also when the action is on a contract; for the person alleging a breach of contract by negligence has of course to prove it. Mr. T. M. Krishnaswami Aiyar however argues that there is an exception to that general rule when property is entrusted to a bailee. There is however no warrant for such a contention either in the Contract Act or in any of the cases quoted before us. No case that we have seen has been decided on the simple ground that a bailee is liable for any accident to the article bailed unless he can prove that the injury resulted through no fault of his own. It is argued on behalf of the respondent that S. 161 of the Indian Contract Act lays this burden upon the bailee; but it clearly does not. S. 161 lays down the common law rule that a bailee who retains an article after the period for which it has been bailed does so at his own risk and is liable for the loss, destruction or deterioration of the goods after the period has elapsed, even though such loss, destruction, or deterioration has occurred through no fault of his. The many cases quoted by Mr. T. M. Krishnaswami Aiyar in support of his contention that the onus of proving that there was no negligence rests always upon the bailee may be divided into two groups. The first relates to articles lost by the bailee. Such cases are *Trustees of the Harbour, Madras* v. *Best & Co.*[1], *Surendra* v. *Secretary of State for India in Council*[2], *Sheo Narain* v. *East India Railway Company*[3], *Hirji Khetsey & Co.* v. *B. B. & C. I. Railway Co.*[4] and *Firm of Gauri Mal-Narain Das* v. *Secretary of State for India*[5] in which the responsibility of a bailee for the loss of the article bailed was considered. We do not refer to certain other cases quoted where there was a loss by a common carrier; for in such cases the bailee has much greater liability. In all the cases referred to above where there has been any discussion of the principles which govern liability, it has been clearly explained that the reason why the burden is thrown on the bailee is that the

1. (1899) I.L.R. 22 Mad. 524.
2. (1916) 25 C.L.J. 37.
3. (1927) I.L.R. 50 All. 246.
4. (1914) I.L.R. 39 Bom. 191.
5. (19-4) 91 I.C. 963.

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fact of the loss is itself *prima facie* evidence of negligence; and it is incumbent on the bailee to rebut that presumption of negligence. In *Trustees of the Harbour, Madras* v. *Best & Co.*[1], for example, the defendants were unable to explain the loss of 816 tons of coal. Benson, J., says:

"The defendants contend that the plaintiffs must show affirmatively that the defendants were guilty of negligence. It seems to me that no evidence could establish the defendants' negligence more clearly and affirmatively than a bare statement of the fact that in the short space of a hundred days they lost no less than 640 tons of coal in their sole custody without being able to give the slightest explanation of its loss."

In *Sheo Narain* v. *East India Railway Company*[2] where there was a theft from a Railway wagon it was pointed out that the manner of the loss was within the peculiar knowledge of the Railway and that they must therefore prove that the loss was not due to negligence on their part. In *Coldman* v. *Hill*[3], some cows were lost by a bailee, who made no attempt to recover them at all. The Court observed that he should have informed the police and the plaintiff, that he was negligent in not doing so, and that as it could not be presumed that if he had done his duty the animals would not have been found, it was held that he was liable. The leading English case on the subject of loss of an animal is *Mackenzie* v. *Cox*[4], where it is made clear that the mere loss of the dog was *prima facie* evidence of negligence. Of the other batch of cases relied on by Mr. T. M. Krishnaswami Aiyar dealing with loss by accident, that case on which he places most reliance, and which has been discussed in considerable detail by the learned Subordinate Judge is *Joseph Travers and Sons, Ltd.* v. *Cooper*[5], where a servant negligently neglected to tie up a barge. At low tide the barge sank in the mud and when the tide rose again the goods were submerged and damaged. There it was held that the failure to tie up the barge was negligence and such negligence might have caused the sticking of the barge in the mud. As the bailee had therefore been negligent and that negligence might have caused the loss, it was incumbent upon the bailee to prove that the damage did not in fact result from that negligence. The reasons given by the Judges who tried this

1. (1899) I.L.R. 22 Mad. 524.
2. (1927) I.L.R. 50 All. 246.
3. (1919) 1 K.B. 443.
4. (1840) 9 C. & P. 632: 173 E.R. 987.
5. (1915) 1 K.B. 73.

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case are clear enough; but great reliance has been placed upon quotations in the judgment from Lord Loreburn in *Morrison* v. *Walton* and from Lord Halsbury in an unreported case. The quotation from Lord Loreburn is that:

" A bailee who had omitted to take a necessary precaution should not be permitted, to saddle upon the parties who had not broken the contract the duty of explaining how things went wrong."

It appears that in that case a barge had been towed across the Atlantic and that there was no man on board it. The barge sank and there was no explanation at all how the accident happened. It was held that the bailee should have kept a man on board the barge and it was quite probable that if he had done so this accident would not have happened. The burden of proving that the accident was not the result of this negligence was therefore upon the bailee. The quotation from Lord Halsbury is:

" It appears to me that there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment. The proof of that rested upon him."

As it was an unreported case we have unfortunately not been able to refer to it; but it seems most unlikely that any such general principle was laid down which was intended to have universal application. If a bailee were always liable for any loss that might occur to goods while in his custody unless he could prove absence of negligence, there would have been no need either in this case or in the other cases quoted to us for a lengthy discussion of the law relating to bailees. As already pointed out, no case has been decided on this simple ground. In *The Rivers Steam Navigation Company* v. *Choutmull Doogar*[1] which was an appeal to the Privy Council from *Choutmull Doogur* v. *Rivers Steam Navigation Company*[2], *prima facie* evidence of negligence was presumed from the fact that a fire broke out inside a ship in a place where it would seem that it could hardly have occurred without negligence on the part of those in management of the ship.

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1. (1898) L.R. 26 I.A. 1: I.L.R. 26 Cal. 398 (P.C.).
2. (1897) I.L.R. 24 Cal. 786.

Ponnappa Nadar v. Parakkalati.

Horwill, J.

It is thus seen that there is no general exception to the rule that the person who alleges negligence must prove it, and the question therefore that has to be decided in this case is whether the death of the elephant was itself *prima facie* evidence of negligence. We do not think so; for animals, like man, are heirs to a thousand diseases, and it would be most unreasonable to conclude from the mere fact of death, whatever the age of the animal might be, that it was due to some form of negligence; and we do not find any warrant for such a conclusion from any of the cases quoted. If the manner of death is known, it is possible for a Court to say whether or no it would lead to a *prima facie* inference that the animal died of negligence. For example, in *Shields* v. *Wilkinson*[1] a horse died through rupture of the diaphragm, resulting from severe exertion soon after taking a substantial meal. This seemed to the learned Judges who tried the case *prima facie* evidence of negligence to take reasonable precautions not to overwork an animal immediately after a full meal; and so the person in whose charge the animal was, was called upon to give some reasonable explanation of the animal's death which would not lead to a necessary inference that there was negligence. As he was able to give such a reasonable explanation it was found that the burden was again shifted upon the plaintiff to show that the death resulted from negligence. In Beven on Negligence, 2nd Edition, page 970, the question was discussed and the learned author writes that ordinarily the burden of proving injury to an animal lies upon the bailor; but that if the article was returned in such a state that negligence would ordinarily be presumed, then the burden was on the bailee. He illustrated this principle with reference to two cases. In the first a horse was returned with broken knees (that is, the skin of the knees had been abraded) and it was held that such an abrasion was not *prima facie* evidence of negligence, as such an injury could result to the horse by its tripping and falling, even though it was proved that the animal was not in the habit of so tripping. Where however a horse was returned with some unusual injury, such as a gash in its side, which could not result from an ordinary use of the horse, the burden was upon the bailee to prove that this injury did not result from neglig-

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2. (1887) I.L.R. 9 All. 398.

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ence on his part. Story, after pointing out the difficulties in deciding upon whom the burden lay in questions of bailment, discussed the difference between the French and the English law and explained that under the French law the person in possession of an animal that met with an injury or death was bound to show that that injury or death did not result from any negligence on his part; whereas English law threw the burden of proof on the bailor. The burden of proving that the elephant died of negligence therefore rests upon the plaintiff.

The evidence in this case with regard to the circumstances which led to the death of the elephant, is most unsatisfactory. None of the witnesses seems to be satisfactory or to have made an attempt to put before the Court the whole truth. The plaintiff, to prove the case of negligence has examined only P. Ws. 3 and 7, P.W. 8 deposing only that he saw the animal fall and that at that time there was a large log of wood near by. P.W. 3 is one of the mahouts sent by the plaintiff with the elephant. He deposes that he remained with the elephant until September, although the defendant would have it that he left as early as June. We agree with the learned Subordinate Judge that in this respect at least his evidence is probably true. We cannot however agree with the learned Subordinate Judge that the two mahouts Narayanan Nayar and P. W. 3 were sent away by the servants of the defendant in order that the latter might illtreat the animal with impunity. A person who has to use an animal for as long a period as a year would not deliberately neglect the animal in such a way that its usefulness for the work required would be materially impaired. Narayanan Nayar left within a few days of his arrival and we find that an agent of the defendant writes a letter (Ex. B) on 16th April, 1923, to the plaintiff in which he says that the elephant did 19 days' work during the previous month, that Narayanan Nayar had gone away after doing only two days' work, that on account of that he had to go off urgently and bring two other men, and that he is very greatly perturbed because P. W. 3 says that he must go away too. He says that if P.W. 3 goes away it will not be possible for anyone there to untie the elephant or make it work, and he asks the defendant to prevent P.W. 3 from leaving. P.W. 3 was a very experienced mahout and had been for 14 years the keeper of this elephant, and it seems to us most unlikely that even in

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September the defendant would have deliberately sent him away. If, as the learned Subordinate Judge suggests, P.W. 3 had been sent away in order to facilitate the overworking of this animal, P.W. 3 would assuredly have gone to the plaintiff, who would himself necessarily have taken steps to protect his own animal. P.W. 7 states that he was the mahout of another elephant but D.W. 7, an owner of an elephant, said by P.W. 7 to have been cared for by him, hasbeen examined to show that P.W. 7 is to a great extent a lier, and the learned Subordinate Judge has not felt inclined to attach any weight to the evidence of P.W. 7. P.W. 8's evidence was intended only to suggest that the elephant had been put to hard labour; but the evidence of the various officials shows that there is no timber of such a size as was said by P.W. 8 to have been drawn by the elephant. The learned Subordinate Judge seems to have been of opinion that the elephant was not overworked, and we are not satisfied that there is any satisfactory evidence that it was. We do not think that the plaintiff would have done nothing at all if his elephant had been grossly overworked and underfed and his own servants sent away in order to render this easier. The learned Subordinate Judge has given a gratuitous finding that the elephant died of exposure in the forest; but we find no reason for thinking that an elephant would suffer by being exposed to the monsoon. Moreover, the finding of the lower Court that the elephant was working until September is inconsistent with this theory; for the monsoon must have ended by that time. We therefore find that the plaintiff has failed to make out a positive case of negligence.

We are not however prepared to agree with the learned Advocate-General that the defendant, who through his agents had the care of the animal, was entitled to fold his arms and leave it entirely to the plaintiff to prove his case. Only the servants of the defendant are in a position to inform the Court of the conditions under which the elephant lived and died. The Court would have liked to have known for example what food was given to the animal, how much work it was given, what happened to it after P.W. 3 left, who was then looking after it, when it first began to show signs of a failure of power to do its work, when it became definitely sick, what was done for the animal when it first began to show signs of serious illness, under what circumstances it met its death, and what steps the

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servants of the defendant took to care for it. There is evidence by the defendant and by P.W. 3, and P.W. 7 supports him in that respect, that the elephant had been showing some disinclination to work for some time before its death. Even in a case of heart disease, as the evidence of the Veterinary Surgeon (D.W. 6) would show, an animal would show certain symptoms of illness for some time before its death; and we feel sure that the illness of this elephant was not so sudden as the defendant would make out. We also think it extremely unlikely that after Velayudhan Chetty left, the animal was not worked at all. Even at the first, new mahouts had been brought in; and they would surely have become accustomed to the animal, and he to them, by the time Velayudhan left. The defendant has examined a Veterinary Officer of the Cochin State who claims to have conducted a *post mortem* examination and to have found that the animal died of a long-standing heart-disease. The learned Subordinate Judge has discussed his evidence at considerable length and he saw the witness in the witness-box; and we are not prepared to disagree with him that the evidence of this witness is quite unreliable. For the reasons given by the learned Subordinate Judge, and in particular because in the suit notice no mention was made of this *post mortem* and its result, we do not believe that a *post mortem* examination was held. We further feel it to be unlikely that the defendant's agent Kochappu would have incurred the considerable expenditure of Rs. 60 for the examination without the defendant's consent. D. Ws. 8 and 9 are the only other witnesses who claim to have an intimate knowledge of the working of the elephant, but D.W. 9 says that he left immediately after Velayudhan. The lower Court came to the conclusion that these witnesses were not working in the forest at all and that their evidence is of no value. We are not prepared to disagree with this finding. The only other evidence giving intimate details of the life of the elephant is that of D. W. 3, a kariasthan of the defendant. D.W. 1, the head clerk of the defendant, went occasionally to the forest; and it was he who brought the Veterinary Officer. Three forest officials, D.Ws. 3 4 and 10, said that they casually visited the scene of the timber-hauling operations and found the elephant tied up. Their evidence has been discredited by the learned Subordinate Judge, and it would not be very valuable even if accepted.

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It is true, we think, that the defendant was not called upon to meet any case that was not put forward by the plaintiff in his pleadings, nor was it incumbent on him to prove a negative case that he was not negligent; but we are not satisfied that he frankly put before the Court the material within his peculiar knowledge, that would give the Court some idea of the condition of the animal and the work done or neglected by it during the period that it was with him. Even in two of the cases quoted by the learned Advocate-General on the question of the primary burden of proof in an action on negligence, the duty of the bailee cast upon him by S. 106 of the Indian Evidence Act is referred to. For example, in *The Kite*[1] a case decided in favour of the bailee, it was pointed out that the plaintiff had to put forward a reasonable explanation of the accident. In *Dwarkanath* v. *The Rivers Steam Navigation Co., Ltd.*[2], the suit barge was tied to another, which caught fire, the fire spreading from one barge to the other, with the result that certain goods which were the subject of the suit, were destroyed. This case was quoted by the learned Advocate-General to show that the burden lies upon the bailor to prove negligence by the bailee and that is what their Lordships held in that case. It was argued before them that under S. 106 of the Evidence Act the duty lay upon the defendant to explain the accident, the facts of which were known to him alone, in such a way as to prove that they were not negligent. Their Lordships agreed that a duty was cast upon the bailee under S. 106 of the Evidence Act; but they thought that the bailee had given a reasonable explanation of how the accident happened and that explanation should be accepted in the absence of proof by the plaintiff that negligence had occurred. A reasonable explanation is all that was required from the defendant in this case; but we cannot say that he has given one. It is only after the defendant, as bailee, has given a reasonable explanation of how the accident happened, that the plaintiff is called upon to prove a positive case of negligence. It would clearly be inequitable to call upon the bailor, who could have had no personal knowledge of how the accident happened, to prove a positive case of negligence when the bailee has failed to set forth the circumstances that led to the sickness and death of the animal.

1. (1933) L.R. Probate 154. 2. (1917) 27 C.L.J. 615 (P.C.).

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A slight modification of the decree will have to be made as the movables claimed in the plaint are said to be still available. The Rs. 100 awarded by the lower Court will therefore be ordered to be paid only in the event of the articles not being returned within two months.

The appeal is therefore dismissed except as indicated in the above paragraph; but in view of the fact that the plaintiff has failed on the principal ground on which this appeal has been argued and has put forward untenable contentions in both Courts, we think that it would not be just to call upon the defendant to pay the costs of the plaintiff throughout. While not interfering with the order of the lower Court as to costs, we will pass no order as to costs in this Court.

S. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

V. Kameswara Aiyar and another .. *Appellants** (*Plaintiffs*)

v.

The Secretary of State for India in Council represented by the Collector of Madura and others .. *Respondents* (*Defendants*).

Kameswara Aiyar v. Secretary of State for India in Council.

Ryotwari land—Levy of increased tax on landowner for excess use of water—Absence of evidence to connect the greater flow of water to any act of the landowner—Levy illegal in the circumstances—Refund with interest ordered.

Where the appellant was undoubtedly the owner of a ryotwari land registered as wet and on the occasion in question water flowed on to his land only through the customary sluice and all that was found by the lower Court was that because there was some obstruction caused by some unknown person to a sluice much lower down, the water banked up in the channel with the result that through the customary sluice of the appellant a greater volume of water than might otherwise have flowed did happen to flow.

Held, that in the absence of evidence to connect the appellant with the blocking up of the channel at the lower point the appellant would be justified in his claim of the amount illegally levied from him with interest thereon at 6 per cent. per annum from the date of institution of the suit till the date of payment.

Kanniappa Mudaliar v. *Secretary of State for India*, (1935) 69 M.L.J. 728: I.L.R. 59 Mad. 107; *Secretary of State for India in Council* v. *Veeranna*, (1937) 1 M.L.J. 732 (F.B.) and *Krishna Row* v. *Collector of Krishna*, (1914) 26 M.L.J. 210, dissented from.

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* S. A. Nos. 761 and 762 of 1933. 28th April, 1937.

Kameswara Aiyar v. Secretary of State for India in Council.

Appeal against the decree of the District Court of Madura in A.S. No. 92 of 1931 preferred against the decree of the Court of the District Munsiff of Madura Town in O. S. No. 322 of 1929.

K. S. Sankara Aiyar and *T. V. Rajagopalan* for Appellants.

The Government Pleader (*K. S. Krishnaswami Aiyangar*) and *T. B. Balagopalan* for Respondents.

The Court delivered the following

JUDGMENT.—In view of the decisions in *Kanniappa Mudaliar* v. *Secretary of State for India*[1] and *Secretary of State* v. *Veeranna*[2] these second appeals must be allowed. The appellant is undoubtedly the owner of ryotwari land registered as wet and on the occasion in question water flowed on to his land only through the sluice through which he is authorised to take water. All that is found is that because there was some obstruction caused by some unknown person to a sluice much lower down, the water banked up in the channel with the result that through the customary sluice of the appellant a greater volume of water than might otherwise have flowed did happen to flow. No serious attempt has been made to connect the appellant with the blocking of the channel at the lower point. On these facts, the principle of the decisions above referred to is clearly applicable, because the appellant could not be said to have "used" the water in the sense there explained. After those decisions, it is no longer possible to follow the observations of Ayling, J., in *Krishna Row* v. *The Collector of Krishna*[3] in all their generality.

It does not appear to me to involve any distinction in principle merely to say that in the prior cases water flowed through a breach in the channel, whereas here the excess flow through the customary sluice was the result of somebody's act in blocking up some lower sluice. If the appellant had in some way been connected with the blocking up of the sluice, the position might be different. In the absence of anything of that kind, it cannot be maintained that the appellant, who had already cultivated these lands in an authorised manner, must

1. (1935) 69 M.L.J. 728: I.L.R. 59 Mad. 107.
2. (1937) 1 M.L.J. 732 (F.B.).
3. (1914) 26 M.L.J. 210.

Kameswara Aiyar v. Secretary of State for India in Council.

be held to have improperly used the extra water that came to his lands through his customary sluice without any act of his own.

The second appeals are allowed and the plaintiffs given a decree for refund of the amounts claimed to have been illegally levied, with interest thereon at six per cent. per annum from the date of the institution of the suit till date of payment. In dealing with the question of costs, I cannot overlook the circumstances that the state of the decisions as they stood at the time when the assessment was levied was such as to warrant the course adopted by the revenue authorities. In the circumstances, I think the proper order will be that in the Courts below each party should bear his own costs but that in this Court the appellant in each case will be entitled to his costs. Time for payment is three months.

Leave to appeal is refused.

K. C. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE VENKATARAMANA RAO.

N. Duraiswami Aiyar, Receiver,
Punganur Zamindari .. *Appellant* in all (Defendant).*

Duraiswami Aiyar, *In re.*

Court-Fees Act (VII of 1870 as amended in Madras), Sch. I, Art. 1 and Sch. II, Art. 17-B—Suit under S. 112, Madras Estates Land Act—Appeal preferred by landlord—Court-fee payable.

Where the landlord prefers an appeal against the decision in a suit filed by a tenant undar S. 112 of the Madras Estates Land Act, the subject-matter of the appeal cannot be said to be incapable of valuation within the meaning of Art. 17-B of Sch. II of the Court-Fees Act as amended in Madras. In such a case the value of the subject-matter of the appeal cannot be more than the annual rent, the recovery of which is resisted, and consequently an *ad valorem* fee paid on such rent is quite sufficient.

Aiyaswami Aiyar v. *District Board, Tanjore,* (1929) 57 M.L.J. 510: I.L.R. 52 Mad. 972, overruled.

Appeals against the decrees of the District Court of Chittoor in A. S. Nos. 98 and 133, 134, 132, 111, 99, 135, 136, 137, 138, 139 and 140 of 1934 preferred respectively against the decrees of the Court of the Sub-Collector of Madanapalle, in S. S. Nos. 7, 5, 6, 4, 3, 8, 9, 10, 11, 12, 13 and 14 of 1933 respectively.

* S. A. Nos. 50 to 61 of 1937. 25th January, 1937.
(S. R. Nos. 12284, etc. of 1935).

Duraiswami Aiyar, *In re.*

B. Somayya and *N. C. Vijiaraghavachari* for Appellant.

N. Srinivasa Aiyangar for *The Government Pleader* (*K. S. Krishnaswami Aiyangar*) on behalf of the Crown.

The order of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—The question raised in this batch of second appeals is, what is the right principle to be applied in regard to valuation of suits filed under S. 112 of the Madras Estates Land Act? Chapter VI of that Act deals *inter alia* with the sale of the ryots' holdings for arrears of rents due. S. 111 provides that when an arrear is not paid within the revenue year in which it accrued due it shall be lawful for the landholder to sell the holding or any part thereof in the prescribed manner. S. 112 then enacts that it shall be incumbent on the landholder intending to avail himself of this power, to serve a written notice on the defaulter, *first*, stating the amount due and *secondly* informing him that in default of his paying the amount or of his filing a suit contesting the landholder's right to sell within the time specified, the holding or a part thereof, as the case may be, will be sold. The present appeals arise out of suits filed by the tenants concerned under the last mentioned section. In both the Courts below, the tenants were successful and the second appeals here have been filed by the landholder. The question is, what is the proper court-fee payable on these appeals? The landholder contends in the words of the office note, that:

"The value of the subject-matter is not more than the annual rent the recovery of which is resisted".

And on that basis he has paid an *ad valorem* court-fee in each appeal. As, however, a different view prevailed in *Aiyaswami Aiyar* v. *District Board, Tanjore*,[1] the question was referred to one of us, Venkataramana Rao, J., who, in view of the importance of the point raised, has directed the matter to be placed before a Bench. It is thus that these cases have come to be heard by us.

The only case in which this question directly arose is *Aiyaswami Aiyar* v. *District Board, Tanjore*,[1] decided by Anantakrishna Aiyar, J. The learned Judge there held that in the case of a suit under S. 112:

"It is not possible to estimate at a money value the subject-matter in dispute"

And that therefore Art. 17-B of the second schedule

1. (1929) 57 M.L.J. 510: I.L.R. 52 Mad. 972.

Duraiswami Aiyar, *In re.*

Venkatasubba Rao, J.

applies. In arriving at this decision, he relied by way of analogy, upon certain three classes of cases, where in the circumstances existing in them, it was held that the subject-matter was incapable of valuation. The reasoning of the learned Judge seems with great respect far from convincing; on the contrary, there is another case* decided by Ananta-krishna Aiyar, J., himself, which on account of its resemblance to the present case, may be said to have a greater bearing on the point raised. The question raised was, what was the proper court-fee payable in respect of suits filed under S. 95 of the Madras Estates Land Act? That section, like S. 112 (the provision with which we are dealing) also occurs in Chapter VI of the Act and refers to a suit by the ryot to contest the distraint effected by the landholder. It provides that a notice shall be served on the defaulter, requiring him either to pay the amount demanded or to institute a suit contesting the distraint within the specified period. It will be seen that these two Ss. 95 and 112 occur not only in the same chapter, but have been enacted to serve the same purpose and prescribe similar, if not identical, procedure. The learned Judge has held, that where suits are filed under S. 95, it is possible to estimate the subject-matter in dispute; if that conclusion is right (and in our opinion it is), it is reasonably clear that the same view should prevail in respect of suits under S. 112.

The notice mentioned in S. 112 is required to state, in the first place, the amount due for arrears which amount, it is obvious, represents both the extent of the tenant's alleged liability and the measure of his interest in the intended suit. The learned Judge observes that in a suit to be filed by the tenant, he may direct his attack not against the *quantum* of the rent claimed, but against the sufficiency of the service of notice and therefore concludes that the amount of rent cannot be the criterion. With great deference there is some fallacy which seems to underlie this reasoning. From the tenant's point of view, what he contests is the landholder's right to sell for the arrear claimed, and if he succeeds, his opponent's right to proceed with the intended sale, comes for the time being, to an end—on what particular ground the tenant makes good his contention, being for this purpose, a matter of no consequence.

[* The reference is to *Maharaja of Pittapuram* v. *Chelikani Venkatarayanim Garu*, (1929) 57 M.L.J. 260, Rep.]

Duraiswami Aiyar, *In re.* — Venkatasubba Rao, J.

As observed in *Bunwari Lal* v. *Daya Sunker Misser*[1], the word used in Art. 17-B is 'estimate', which involves the "idea of approximation", that is to say, all that is contemplated is that the subject-matter is capable of being approximately, and by no means accurately valued. Anantakrishna Aiyar, J., observes, as a further argument in support of his conclusion, that in the case of a taxing statute a construction most beneficial to the subject should be adopted. This canon has obviously no application. In the case decided by the learned Judge *Aiyaswami Aiyar* v. *District Board, Tanjore*,[2] the landholder was interested in arguing having regard to the amount of the fee payable on the *ad valorem* basis that Art. 17-B applied; in the present cases he is interested in putting forward the very opposite of that contention, as the court-fee which he would be liable to pay, were that article applicable would be greater than the amount payable *ad valorem* on the annual rent claimed.

In the result, we decide that the contention of the landholder's counsel must prevail. The learned Government Pleader, we may observe, has supported that contention stating frankly that his desire is to obtain a considered ruling.

We think that as between the Government and the Government Pleader Rs. 75 for the whole batch would be the proper fee.

B. V. V. —— *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

C. Ramasubbier .. *Appellant** (*Plaintiff*)

v.

G. Muhomed Khan Saheb and another .. *Respondents* (*Defendants*).

Ramasubbier *v.* Muhomed Khan Saheb.

Easement—Right to throw filthy water on neighbour's land—Mode of acquisition—Exercise for term short of statutory period—Actionable nuisance—Remedy by way of injunction—Mere delay whether disentitles party to relief—Easements Act (V of 1882), S. 15.

The right of throwing filthy water on a neighbour's land is an easement which can only be acquired either by grant or under S. 15 of the Easements Act by prescription. Where such a right has not been acquired by prescription, the enjoyment being for less than the statutory period, the act of pollut-

1. (1909) 13 C.W.N. 815.
2. (1929) 57 M.L.J. 510: I.L.R. 52 Mad. 972.

* S. A. No. 313 of 1933. 22nd March, 1937.

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ing amounts to a nuisance which is actionable. The injured party may in such a case apply to the Court for an injunction without having recourse to the remedy of abating the nuisance; and the mere fact that there has been delay on the part of the plaintiff will not disentitle him to the relief of injunction if the situation of the parties has not been altered by such delay.

Goddard on Easements, 8th Edition, pp. 438, 447; *Pollock on Torts*, 13th Edition, pp. 426, 442; *Bonner* v. *Great Western Railway Co.*, (1883) 24 Ch. D. (C.A.) 1; *Lindsay Petroleum Co.* v. *Hurd*, (1874) 5 P.C. 221 at 240 and *Greenhaigh* v. *Brindley*, (1901) 2 Ch. 324 at 328, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of Salem in A. S. No. 84 of 1931, preferred against the decree of the Court of the District Munsif of Dharmapuri in O. S. No. 398 of 1929.

K. Subba Rao for Appellant.

T. Krishnarajan for Respondents.

The Court delivered the following

JUDGMENT.—The judgment of the lower appellate Court is in my opinion utterly wrong and cannot be supported. The plaintiff and the defendant own adjacent houses with backyards abutting on each other. A drain has been constructed on the defendant's land, through which the sewage is poured through an opening into the plaintiff's backyard. Somewhere near the drain on the defendant's property stands a latrine. The plaintiff complains that the defendant has no right to pour the filthy matter on his land and prays for an injunction both to restrain him from doing so and to direct the removal of the drain. The finding of both the Courts is, that the drain on the date of the suit was in existence for about thirteen years, and the simple point that arises for decision is, whether the plaintiff is entitled to the remedy of injunction. The right of throwing filthy water on a neighbour's land is an easement which can be acquired either by grant or under S. 15 of the Easements Act by prescription: the words "any other easement" in that section are comprehensive enough to include such a right. Where such a right has not been acquired, the act of polluting amounts to a nuisance which is actionable. In an action for nuisance (and in my opinion this is essentially a suit of that sort) the defendant may justify his act by relying upon prescription; but in this case, his enjoyment, as already stated, being for less than the statutory period, that defence is not available to him. Transmitting filthy water may be likened to the polluting of the air and in both cases there is a right of

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action. The following passage in *Goddard on Easements*, dealing with the subject of polluting the air, shows what the true legal principle is underlying such an action:

"A right to pollute the air has been shown to be an easement which can be acquired only by grant or by prescription—that is, when an uninterrupted practice of polluting has been continued for twenty years in a manner capable of being resisted on account of it being a nuisance and it has not been resisted".

Then he goes on to say that a person, until an adverse easement is gained against him, may rely upon his natural right and sue for the pollution. (*Goddard on Easements*, 8th Edition, p. 438.)

That is to say, in respect of the throwing of filthy water, as in the case of polluting the air, an action lies for nuisance, which the defendant can resist by proving an acquisition by him of the easement, or, in the words of Pollock, "the defendant may in some cases justify by prescription". (*Pollock on Torts*, 13th Edition, p. 426.) Thus, if the defendant could establish an adverse right acquired by prescription, what would otherwise amount to a nuisance would cease to be so; or, what amounts to the same thing, the act complained of would cease to be an actionable nuisance. In this case, upon the facts that the plaintiff is entitled to some remedy, there can be no doubt. The remedies for nuisance are three-fold: abatement, damage and injunction. The plaintiff here could have abated the nuisance by merely filling up the hole opening on his land; but where the remedy by injunction is available, that is, the preferable course as abatement may prove a hazardous proceeding. (*Pollock on Torts*, 13th Edition, p. 436.) However, had the plaintiff chosen by his own act to abate the nuisance, would the Court have granted at the defendant's instance an injunction? In *Bonner* v. *Great Western Railway, Co.*[1], the plaintiff was the owner of a house, some of the windows of which overlooked a piece of land belonging to the Railway company. After the house had been in existence for sixteen years, the company put up a screen opposite the plaintiff's windows to prevent his acquiring an easement of light and air. The plaintiff brought an action for injunction and the Court of Appeal held that he had no equity to restrain the company from taking measures to prevent prescriptive rights from being acquired for windows

1. (1883) 24 Ch. D. (C. A.) 1.

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looking upon their land. Baggallay, L. J., observes that it is contrary to every principle that a person who has no right should obtain an injunction to restrain anybody from doing that which will interfere with his acquiring a right, by reason of his being unmolested for a certain length of time (p. 8). This case is not exactly parallel, there being no question there of anything amounting to a nuisance; but it furnishes an illustration of the right which a person has, to take measures to prevent prescriptive rights from being acquired.

But then it is said (and that is the view of the lower Court) that the plaintiff has been guilty of laches which disentitles him to an injunction. Turning again to Goddard, the following passage shows what the principle is, underlying this contention:

"Although the circumstances of a case may be such that the Court would, in its discretion, think it a case fit for the grant of an injunction, to restrain pollution of air, it is always essential for the obtaining of that remedy that the party injured shall not have acquiesced in the pollution, nor have slept upon his rights, for if he has done so the Court would refuse an injunction, though it would probably award him damages for the injury". (P. 447.)

I cannot understand what possible equity can be urged on the defendant's side in the present case. Granting that there has been laches (I assume this for the sake of argument) how has the defendant's position been prejudiced thereby? The case is not one of demolition or destruction of costly structures and the loss, if any, which the defendant will suffer by his removing or diverting the course of drain, is in my opinion negligible. Whether an injunction shall be granted or not in any case, is in the judicial discretion of the Court, now guided by principles which have become pretty well settled. (*Pollock on Torts*, 13th Ed., p. 442.) As Sir Barnes Peacock observes:

"If an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable."

Then again:

"Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy".

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In that case his Lordship after adverting to the facts, concluded by observing, that there was no reason to attach any importance to the defence founded upon time, as the situation of the parties had in no substantial way been altered either by delay or by anything done during the interval. (*Lindsay Petroleum Co.* v. *Hurd*[1].) In a case of this sort the defence based upon delay is not, in my opinion, entitled to much weight. Farwell, J., points out (and that accords with one's experience of human nature), the changes are far greater that the injured party will assert his rights in the second rather than in the first half of the prescriptive period. (*Greenhaigh* v. *Brindley*[2].) A person may be willing to submit to an injury for some time: that does not mean that from his attitude it should be inferred that he wishes to put up with it for ever. Again, when he is conscious that he may terminate it at his pleasure, he may not complain; that is different from saying that he acquiesces in the opposite party acquiring a legal right to inflict the injury.

In the result, an injunction will issue prohibiting the defendant from pouring the sewage upon the plaintiff's backyard and secondly, directing him to remove or divert the drain to such an extent or in such a manner as to prevent the transmission on the sewage to the aforesaid backyard. This order applies to the upper as well as the lower drain. The relief granted by the lower appellate Court in respect of the eaves will stand.

In regard to costs this is the order I make. The trial Court's order pertaining to them will be maintained. In the lower appellate Court the appellant before me will get his costs in Appeal No. 84 of 1931 and here the second appeal is allowed with costs. Leave to appeal is refused.

B. V. V. *Appeal allowed.*

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1. (1874) 5 P.C. 221 at 240. 2. (1901) 2 Ch. 324 at 328.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

Sri Rajah Vijiya Apparao Savai Aswarao Bahadur Zamindar Garu and another .. *Appellants** (*2nd Plaintiff and Nil*)

v.

The Secretary of State for India in Council represented by the Government Agent and Collector, East Godavari at Cocanada .. *Respondent* (*Defendant*).

Madras Revenue Recovery Act (II of 1864), S. 58—Revenue assessment—Revision of rates within the period of thirty years by notification under Government Order—Valid.

Rajah Vijiya Apparao *v.* Secretary of State for India in Council.

Where there can be no doubt that the assessment which a landowner (plaintiff) was called upon to pay was one which the Government actually sanctioned by their Order, the landowner cannot by a civil suit question such assessment as illegal in the face of S. 58 of the Madras Revenue Recovery Act.

The principle laid down in *Kelu Nair* v. *Secretary of State for India in Council*, (1925) 49 M.L.J. 79: I.L.R. 48 Mad. 586, will not avail the plaintiff in the circumstances of the case.

Appeal against the decree of the District Court of East Godavari at Rajahmundry dated 11th April, 1935 in O. S. No. 57 of 1933 (O. S. No. 4 of 1931 on the file of the Court of the Government Agent, East Godavari at Cocanada).

P. V. Rajamannar and *K. Subba Rao* for Appellants.

The Government Pleader (*K.S. Krishnaswamy Aiyangar*) for Respondent.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—The appellant is the superior proprietor of the Bhadrachalam Estate; he filed the suit for a declaration that the assessment imposed on that estate for a period of 30 years from Fasli 1332 was *ultra vires* and illegal, as being in contravention of certain Government Orders of 1886 and 1922. The assessment itself was imposed in pursuance of G. O. No. 1373 dated 10th September, 1923 (Ex. V). It is this Government Order that directed the publication of the notification, which has been marked Ex. D in the case stating that a

* Appeal No. 157 of 1935. 18th March, 1937.

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revision of the rates and conditions of assessment in the Bhadrachalam taluk will be carried out with effect from Fasli 1332, in accordance with the orders conveyed in G. O. No. 815 Rev., dated 5th May, 1922.

Ex. V shows that at the time of passing that order, the Government had before them a communication from the Board of Revenue dated 9th May, 1923. That apparently was the letter of the Board containing the revised statements called for in paragraph 11 of G. O. No. 815 dated 5th May, 1922 (Ex. C). There can thus be no doubt that the assessment which the plaintiff has been called upon to pay is the one which the Government actually sanctioned by their Government Order of September, 1923. If this is the true position on the facts, it is difficult to see how any civil suit will lie to question such assessment in the face of S. 58 of the Madras Revenue Recovery Act.

The principle laid down in *Kelu Nair* v. *Secretary of State for India in Council*[1] will not avail the plaintiff in the circumstances of the present case. We do not therefore think it necessary to consider whether any observations in that judgment require any qualification. Assuming for the sake of argument that a notification in terms of Ex. D will give such a right to a landholder as will entitle him to maintain a suit to impeach any assessment made in contravention of that notification, there can be no doubt that the notification must be construed in the light of the whole Government Order of which it formed a part, and as we have already pointed out above, the assessment now imposed upon the plaintiff is the very assessment sanctioned by that Government Order.

The learned District Judge has also examined the plaintiff's contention on the merits and has come to the conclusion that apart from the bar to the maintainability of the suit, the assessment imposed under G. O. No. 1373 of September, 1923, has not departed from the principles supposed to have been laid down in the Government Order of May, 1922. We may go further and observe that, on a reading of the whole document, the Government Order of May, 1922, cannot be said to have laid down any particular principle at all but merely accepted what has been going on during the period of the prior

1. (1925) 49 M.L.J. 79: I.L.R. 48 Mad. 586.

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30 years' settlement and suggested certain modifications to be made in making the re-settlement in the light of changes that had taken place between 1890 and 1920. The Deputy Collector had made certain proposals in that behalf, and the Revenue Board had made their remarks on those proposals. It is in connection with those details that the Government Order of May, 1922, gave certain directions, and the Government had accordingly to call upon the Board by paragraph 11 of Ex. C to submit revised statements in the light of the directions contained in the preceding paragraphs. We may also observe that, while there was an intelligible reason for giving a particular guarantee to the superior proprietor at the settlement of 1890, namely, that the higher rate of assessment then introduced should be so brought into force as not to reduce his net income by more than 15 per cent. of what it was previously, there was no occasion in 1920 for giving any such guarantee with reference to the proprietor's net income immediately preceding 1920, because, in the re-settlement sought to be introduced in 1920, there was no enhancement of the rate of assessment; only the additional beriz that was being realised by the proprietor on account of enhancements of rents in the Estate and of extension of cultivation, was also brought into calculation in fixing the assessment, with the result that the amount of revenue payable to the Government became larger. This did not threaten his net income in the sense in which it was threatened in 1890. Government therefore rightly pointed out in Ex. F that the landlord had no reason to complain when the net additional income realised by him was also sought to be subjected to assessment at the *pre-existing* rate of assessment. We therefore agree with the learned District Judge that even on the merits, the plaintiff has no ground of complaint.

The appeal fails and is dismissed with costs.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Pazhangotte Unnikanna Menon .. *Appellant** (*1st Plaintiff*)

v.

Karimkulangara tarwad Karnavan, Lakshmi Vayankara Amma's son Kesavan Unni Nair and others .. *Respondents* (*Defendants 1 to 29, 37, nil, 49, 39, 48, 40 and nil*).

Unnikanna Menon *v.* Kesavan Unni Nair.

Madras Hindu Religious Endowments Act (II of 1927 as amended by Act 1930), Ss. 18 and 76—One of trustees of a temple executing kanom lease to another without concurrence of other trustees—Kanom invalid—General law—How far sections of the Act enable a trustee to deal with it.

Where a suit was filed for redemption of a kanom granted by the trustees of a Malabar temple in favour of the tarwad of the defendants and the only question for determination was whether the melkanom granted by the 2nd plaintiff, one of the five trustees, to the first plaintiff, was valid,

Held, (1) since neither the melkanom was granted in consultation with the other trustees nor was it the act of the majority, it would not be valid under the general law. [*Kunhan* v. *Moorthi*, (1910) 20 M.L.J. 951: I.L.R. 34 Mad. 406.] The execution of renewals in favour of the original kanomdars by the other trustees independently of the second plaintiff could not possibly entitle the second plaintiff to act by himself.

(2) Moreover S. 76 of the Madras Hindu Religious Endowments Act does not empower the Board to authorise an alienation of temple property by persons, not competent under the general law to deal with it.

The Act does not authorise the Board to ignore the existence of hereditary trustees or supersede them.

Appeal against the decree of the Court of the Subordinate Judge of Palghat in A.S. Nos. 44 and 45 of 1932 preferred against the decree of the Court of the District Munsiff of Palghat in O.S. No. 51 of 1929.

C. Unikanda Menon for Appellant.

A. Sivarama Menon, S. Venkatachala Sastri, K. Kuttikrishna Menon and *C. V. Mahadeva Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit for redemption of a kanom granted by the trustees of the Chengattoor Ayyappan temple in favour of the tarwad of defendants 1 to 29 and the sole question for determination is whether the melkanom granted by the second plaintiff, one of the five trustees, to the first plaintiff, is valid. The melkanom was not granted in consultation with the other trustees nor is it the act of the majority. It would therefore be invalid under

* S. A. No. 202 of 1933. 15th March, 1937.

Unnikanna Menon v. Kesavan Unni Nair.

the general law, vide *Kunhan* v. *Moorthi*[1] and the execution of renewals in favour of the original kanomdars by the other trustees independently of the second plaintiff cannot possibly entitle the second plaintiff to act by himself. The melkanom in question cannot therefore be upheld under the general law, nor does S. 76 of the Madras Hindu Religious Endowments Act empower the Endowments Board to authorise an alienation of temple property by persons not competent under the general law to deal with it. That section only invalidates alienations of the kind specified therein by competent persons unless sanctioned by the Board on the ground of necessity or benefit and, as pointed out in *Ramaswami Poosari* v. *The Madras Hindu Religious Endowments Board*[2] in which the powers of the Board under S. 18 of the Act as amended in 1930 were considered, the Board has no powers of interference with hereditary trustees of excepted temples, as in this case, in matters of internal management. The Act does not authorise the Board to ignore the existence of hereditary trustees or supersede them, nor does S. 18 empower the Board to authorise an alienation of temple property by a person not competent to deal with it under the general law. There was also no occasion for the exercise of any emergency powers and it follows that the Subordinate Judge was right in holding that the melkanom was invalid. The suit was therefore rightly dismissed and the first plaintiff may enforce his claim, if any, in respect of the renewal fee for the melkanom in a separate suit.

The second appeal therefore fails and is dismissed with costs of the third respondent.

Leave is refused.

K. C. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD MACMILLAN, SIR SHADI LAL AND SIR GEORGE RANKIN.

Parmeshari Din .. *Appellant**

v.

Ram Charan and others .. *Respondents.*

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Parmeshari Din v. Ram Charan.

Transfer of Property Act (IV of 1882 as amended), S. 52—Doctrine of lis pendens—*Transferee as representative in interest—Delivery of possession of property transferred—Other party not bound.*

1. (1910) 20 M.L.J. 951: I.L.R. 34 Mad. 406. 2. (1934) 68 M.L.J. 178.

* P. C. Appeal No. 47 of 1935 and Allahabad Appeal No. 14 of 1933. 14th June, 1937.

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Parmeshari Din *v.* Ram Charan.

Where a person obtains property by transfer from the defendant *pendente lite* he should be treated as the representative in interest of the transferor defendant, and he is bound by the result of the decree. And the mere circumstance that he got possession from the defendant in pursuance of a transfer, which was invalid as against the plaintiffs cannot detract from their rights under the decree.

Bellamy v. *Sabine*, (1857) 1 De G. and J. 566: 44 E.R. 842, referred to. Decision of the Allahabad High Court affirmed.

V. K. Krishna Menon for Appellant.

Respondents not represented.

14th June, 1937. Their Lordships' judgment was delivered by

Sir Shadi Lal.

SIR SHADI LAL.—This appeal, which has been heard *ex parte*, raises the question of the application of the doctrine of *lis pendens* to a transfer of immovable property, upon which the appellant founds his claim. The facts bearing upon the question lie within a narrow compass. The plaintiffs, who are respondents before their Lordships, were mortgagees of the property in dispute, and commenced in 1923 an action for the foreclosure of the mortgage against the mortgagor, Nurul Hassan and one Ram Narain. They obtained, on the 30th September, 1924, a preliminary decree for foreclosure, which, after an unsuccessful appeal by Ram Narain to the Chief Court at Lucknow, was followed on the 28th July, 1928, by a final decree for foreclosure.

The decree-holders then made an application for the recovery of the property by executing their decree, and obtained symbolical possession from the judgment-debtors. The appellant, Parmeshari Din, was, however, in actual possession of it, and he based his title to it upon a usufructuary mortgage granted to him by Nurul Hassan on the 15th February, 1924, and upon a sale of the equity of redemption in February, 1928, in execution of a money decree against the mortgagor. It will be observed that the mortgage and the sale invoked by the appellant took place during the pendency of the plaintiffs' suit for foreclosure; and the plaintiffs, relying upon the rule of *lis pendens*, sought to recover possession of the property from the transferee. The Court of first instance dismissed the application, but the Court of Appeal has granted it, holding that the transfer in favour of the appellant being *pendente lite* cannot adversely affect the rights of the plaintiffs; and that the appellant is bound by the decree in their favour to the same extent as his transferor.

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Parmeshar Din *v.* Ram Charan.

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Against the judgment of the Court of Appeal, the transferee has preferred this appeal, and it is argued on his behalf that the doctrine of *lis pendens* does not apply, as there was no active prosecution of the suit, when the transfer in question was made. Now, S. 52 of the Transfer of Property Act IV of 1882, which embodies the rule of *lis pendens*, prohibited a transfer made during the active prosecution of a suit or proceeding in which any right to immovable property was directly and specifically in question. The expression "active prosecution", which existed in the section before its amendment in 1929, led to much uncertainty in the application of the rule, and caused a divergence of judicial opinion. It was felt that the standard of diligence, which would constitute "active prosecution", could not be defined with precision. To remove this uncertainty, the law was amended in 1929, and the amending Act XX of 1929 substituted the word "pendency" for the phrase "active prosecution"; and there can now be no difficulty in deciding whether the transfer was made during the pendency of a suit or proceeding.

It is clear that the question of the active prosecution of a suit is one of fact, but it was not suggested in either of the Courts in India that the plaintiffs had not actively prosecuted the suit, and were consequently debarred from availing themselves of the rule of *lis pendens*. The learned Judges of the Court of Appeal had, therefore, no opportunity to express their opinion on this point; and their Lordships cannot entertain an objection, which depends upon a question of fact not dealt with below. Upon the record before them, there is no indication of any delay or remissness in the prosecution of the suit, for which the plaintiffs can be held responsible.

Their Lordships, therefore, agree with the High Court that the transfer relied upon by the appellant cannot prejudice the rights of the decree-holders, and that he cannot resist the decree obtained by them.

It is then said that the appellant was not a party to the decree which is sought to be executed against him. But he took the property from the defendant *pendente lite* and must be treated as his representative in interest. He is bound by the result of the decree. If he had not obtained possession of the property from the defendant, the latter would have been required to deliver it to the plaintiffs. And the mere circumstance that he got possession from the defendant in pursuance

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of a transfer, which was invalid as against the plaintiffs, cannot detract from their rights under the decree. As observed by Cranworth, L.C., in *Bellamy* v. *Sabine*[1] "*pendente lite* neither party to the litigation can alienate property in dispute so as to affect his opponent". The decree-holders are, therefore, entitled to execute the decree against the appellant, who is the representative of their judgment-debtor. As stated above, they obtained only symbolical possession from the judgment-debtor, and there is no reason why they should not be allowed to proceed against his representative who is in actual possession of the property.

The dispute between the appellant and the decree-holders related to the execution of the decree, and, as he was the representative of the judgment-debtor, the Court executing the decree had jurisdiction under S. 47 of the Civil Procedure Code to determine that dispute. The Court of first instance did determine it; and, as all the requirements of the section were satisfied, the decree-holders were entitled to appeal against that decision to the High Court.

In their Lordships' opinion the appellant cannot be allowed to defeat the claim of the decree-holders. Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed. They will, however, make no order as to the costs of the appeal, as there is no appearance before them by, or on behalf of, the respondents.

Solicitors for Appellant: *Nehra & Co.*

R. C. C. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD MACMILLAN, SIR SHADI LAL AND SIR GEORGE RANKIN.

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Goswamini Shri Kamala Vahooji Maharaj of Kutch Mandvi v. Collector of Bombay.

Goswamini Shri Kamala Vahooji Maharaj of Kutch Mandvi, by her Attorney Dharamdas Tribhovandas .. *Appellant**

v.

The Collector of Bombay .. *Respondent.*

Grant—Exemption from land revenue—Burden of proof—Presumption as to lost grant—Prescriptive right to exemption—Proof—Bombay City Land

1. (1857) 1 De G. and J. 566 : 44 E.R. 842.

* P. C. Appeal No. 48 of 1936. 17th June, 1937.

Revenue Act, 1876, Ss. 8 and 14—Effect—Bombay Regulations XVII and XIX of 1827—Applicability.

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When an owner of land claims a right that the land shall be free from assessment for land revenue the burden is on him to show that he has a right in limitation of the right of Government to make an assessment in consequence of a specific limit to assessment having been established or preserved.

The law may presume the existence of a grant which has been lost where it is sought to disturb a person in the enjoyment of a right which he and his predecessors have immemorially enjoyed, but it is a different thing to seek to presume that the Crown has, by some lost grant, deprived itself of the prerogative power to tax the property of its subjects.

S. 8 of the Bombay Land Revenue Act of 1876 would appear to apply rather to the case of a limitation on the right to assess than to the case of a complete exemption from assessment to revenue.

Bombay Regulation XVII of 1827 does not apply to property situate in the City of Bombay; and Regulation XIX of 1827 which applies to such property does not contain a provision for recognising a prescriptive right to exemption from assessment to land revenue.

Held, on the facts, that the suit property, which was situate at Cutch Mandvi and held by the spiritual head of a Vaishnavite temple, was not exempt from assessment to land revenue either on the ground of prescription or by the application of the presumption as to lost grant.

Decision of the Bombay High Court affirmed.

Appeal from a decree of the High Court of Bombay (Beaumont, C. J. and Wadia, J.) dated 3rd August, 1933, reversing a decree of the Revenue Judge dated 20th October, 1927.

A. M. Dunne, K.C., W. Wallach and *J. M. Parikh* for Appellant.

Sir Thomas Strangman for Respondent.

17th June, 1937. Their Lordships' judgment was delivered by

Lord Macmillan.

LORD MACMILLAN.—"On the 26th October, 1926, the Collector of Bombay addressed to the appellant a notification that the Government had been pleased to sanction, under S. 8 of the Bombay City Land Revenue Act of 1876, the assessment of certain property in Bombay belonging to her described as "Land at Bora Bazar Street, bearing N.S. [New Survey] No. 8841 and C. S. [Cadastral Survey] No. 1356." The notification indicated the scale on which the property had been assessed, and stated that the assessment would come into force from the 1st November, 1926, and would be guaranteed for 99 years from that date.

Availing herself of the provisions of S. 14 of the Act of 1876, the appellant instituted a suit against the respondent,

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contesting the legality of the assessment. She prayed for a declaration "that there is a right on the part of the plaintiff in limitation of the right of Government to possess and hold her said land free from assessment and that the defendant has no right to levy any assessment." The learned Revenue Judge, on the 20th October, 1927, gave judgment for the plaintiff and granted her a declaration as craved. On the 3rd August, 1933, the High Court of Judicature at Bombay reversed the decree of the Revenue Judge and dismissed the suit. Hence the present appeal."

The only question before their Lordships is whether the appellant is entitled to total exemption from assessment to land revenue in respect of the property mentioned. S. 8 of the statute of 1876 under which the assessment purports to be made reads as follows:—

"8. It shall be the duty of the Collector, subject to the orders of Government, to fix and to levy the assessment for land revenue. When there is no right on the part of the superior holder in limitation of the right of Government to assess, the assessment shall be fixed at the discretion of the Collector subject to the control of Government. When there is a right on the part of the superior holder in limitation of the right of Government, in consequence of a specific limit to assessment having been established and preserved, the assessment shall not exceed such specific limit."

"The words 'land revenue' signify any sum of money legally claimable by Government from any person on account of any land . . . . held by or vested in him . . . ." and "The words 'superior holder' signify the person having the highest title under Government to the land in respect of which land revenue is payable" [S. 3 (2) and (4)].

It is remarkable that the statute contains no provisions relating to exemption from payment of land revenue (although their Lordships are given to understand that cases of total exemption exist and are recognised) other than the words of S. 8 just quoted, which appear to apply rather to the case of a limitation on the right to assess than to the case of a complete exemption from assessment. Learned counsel for the Crown, however, informed their Lordships that it was in virtue of these words in S. 8 that total exemption where established was in practice recognised.

The burden is plainly on the appellant to show that, as the superior holder of the property in question, she has "a right in limitation of the right of Government in consequence of a specific limit to assessment having been established or preserved,"

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and that that specific limit is nil. However awkward and inartistic, that is the only way, as the parties are agreed, in which the issue between them can be fitted into the statute.

The property is owned by the appellant as spiritual head of a Hindu Vaishnava temple situated at Cutch Mandvi. The earliest title deed is dated 1788, and is a conveyance to two persons. The property appears to have descended to the daughter of one of them who in 1828 devised it to her spiritual guru; and the appellant claims under that guru. It is not necessary for the present purpose to explore the early history of land tenure in the Island of Bombay, of which the learned Revenue Judge gives an interesting summary. It suffices to note that the plaintiff alleges and the Crown admits that "no land revenue has ever been charged in respect of the said property"; that the property has not been entered in the Rent Rolls of the Collector; and that, in the Survey Register of 1813, the entry against it in the rent column is "no ground rent", and, in the Survey Register of 1869, the entry against it in the tenure column is "O." It further appears that the question of the assessibility of the property was raised in 1913 when, after inquiry, the Department passed a minute in the following year that "the land cannot be assessed since it is held without assessment for more than 60 years under G. R. No. 1976 dated 12th March, 1904. A note to this effect may be made in this Register." The Government Resolution of the 12th March, 1904, was to the effect that no assessment should be imposed where lands had remained unassessed for 60 years. The entry made in the Register recorded that the "land is charitable and is held free of rent and cannot now be assessed"; but this entry is deleted and there is added: "This note has been struck off in view of" two opinions of the Advocate-General. All this amounts, however, to no more than a revelation of the vacillation of the Crown's advisers as to the assessibility of the property, for their Lordships agree with both the Courts below that there is nothing in the nature of an estoppel or bar to prevent the present assessment if it is otherwise justified, and indeed no argument to a contrary effect was submitted.

The appellant has not been able to produce any deed or grant conferring the exemption which she claims. But she maintains that she has a prescriptive right of exemption, and that, in virtue of its long enjoyment, a lost grant conferring it

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must be presumed. If so, her right, in order to be effectual, must, in the terms of S. 8 of the 1876 Act, have been "established and preserved". Without pausing to consider the meaning of these words, their Lordships proceed to examine the claim as founded on prescription or lost grant.

Counsel for the appellant referred first to Bombay Regulation I of 1823 which in its preamble recites *inter alia* that "it is expedient that the enjoyment of exemption from revenue for a period of 60 years should in certain cases be held as proof of sufficient title to the exemption" and proceeds in S. 4 to provide that "Whenever land has been enjoyed without payment of the public revenue for more than 60 years in succession by any person, his heirs or others deriving right from him, such enjoyment shall be considered as sufficient title to the exemption". Counsel for the Crown maintained that this Regulation had no application to the City of Bombay but was applicable only to the mofussil. It is not necessary to consider the point, for the Regulation was repealed by Regulation I of 1827. In the latter year a number of Regulations were made of which Regulations XVII and XIX are material. Regulation XVII, which is entitled "A Regulation for the Territories subordinate to Bombay", in Chapter IX, S. 36, repeated in terms S. 4 of the repealed Regulation of 1823 above quoted. The period of 60 years therein mentioned was reduced to 30 years by Regulation VI of 1833. In 1863 Chapters IX and X of Regulation XVII of 1827 and Regulation VI of 1833 were repealed by S. 1 of the Bombay Act VII of that year which substituted in S. 21 a similar provision requiring claims to exemption from payment of land revenue in virtue of prescription to be admitted, in the case of lands in certain districts, if proved to have been held exempt from payment of land revenue under a tenure recognized by the custom of the country for 60 years prior to the date of the Act, and in the case of other lands if proved to have been held in like manner for 30 years. All that was left of Regulation XVII of 1827 was finally repealed by the Bombay Land Revenue Code, 1879, S. 2 and Schedule A. The learned Revenue Judge was of opinion that under the provisions of Chapter IX, S. 36, of Regulation XVII of 1827, there was acquired a vested right of exemption from land revenue as regards the property in question inasmuch as for at least 60 years exemption had in fact been enjoyed. But

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the Crown submits that Regulation XVII of 1827 did not apply to the City of Bombay, and the High Court has so held. Apart from intrinsic indications in the Regulation itself, which are elaborated by Beaumont, C.J., a conclusive argument against the applicability of Regulation XVII to the City of Bombay is to be found in the fact that on the same day another Regulation, namely Regulation XIX of 1827, was made which is entitled "A Regulation for the Presidency, prescribing rules for the assessment and collection of the land revenue." "The Presidency" clearly means the Island of Bombay. The 3rd section of Regulation XIX provides that "the land revenue of the Presidency shall be assessed and levied by the Collector and his assistants accordingly to the principles laid down in Regulation XVII, A.D. 1827, S. 3, the three first causes of S. 4, S. 5 and the first clause of S. 6." If Regulation XVII were applicable to the Presidency, it would be quite inappropriate in Regulation XIX, which applies to the Presidency, to adopt and apply to the Presidency selected provisions of Regulation XVII. It would clearly appear that, at any rate from 1827 onwards, the land revenue legislation for the Presidency and for the mofussil ran on separate lines. Their Lordships therefore agree with the High Court in holding that Regulation XVII does not apply to the property in question. But Regulation XIX, which does apply, contains no provision for recognising a prescriptive right to exemption from land revenue such as is contained in Chapter IX, S. 36, of the Regulation XVII, and while adopting some of the provisions of Regulation XVII has not adopted Chapter IX, S. 36. The appellant therefore cannot rely on any statutory prescriptive title to exemption.

But the appellant submits that in the circumstances a lost grant should be presumed, and that this lost grant should be presumed to have contained an exemption from land revenue or a "right in limitation of the right of Government" to assess the property. The law may presume the existence of a grant which has been lost where it is sought to disturb a person in the enjoyment of a right which he and his predecessors have immemorially enjoyed, but it is a different thing to seek to presume that the Crown has, by some lost grant, deprived itself of the prerogative power to tax the property of its subjects, and their Lordships are of opinion that this plea is untenable.

The appellant having thus failed to discharge the burden of proving the existence of an "established and preserved"

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right on her part in limitation of the right of Government to assess her property, the Collector was entitled to fix an assessment at his discretion, subject to the control of Government, as he has done.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed and the decree of the High Court of Judicature at Bombay of 3rd August, 1933, affirmed. The appellant will pay the respondent's costs in the appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondent: *The Solicitor, India Office.*

R. C. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CORNISH AND MR. JUSTICE VARADACHARIAR.

The Board of Commissioners for the Hindu Religious Endowments, Madras .. *Appellant* (1st Defendant)*

v.

Parasaram Veeraraghavacharlu and others .. *Respondents (Plaintiffs and Defendants 2 and 3).*

Board of Commissioners for H.R.E., Madras v. P. Veeraraghavacharlu.

Madras Hindu Religious Endowments Act (II of 1927), S. 57 (3)—Scheme framed by Board—Suit for cancellation—Allegation of change in the idol—Competence of Board to frame a scheme—Question of title to property—Whether could be gone into by the Board—Inam properties—Whether change in idol would effect a change in the nature of rights.

The Madras Hindu Religious Endowments Board framed a scheme for the proper administration of a Vishnu temple. The scheme purported to deal with the temple as the temple of Sri Venugopalaswami and it vested certain properties in trustees to be appointed for the temple. The plaintiffs who were in possession raised the contentions that there was no such idol with the name of Sri Gopalaswami then, but such an idol had ceased to exist since 1819, that the temple then in existence had an idol by the name of Chinnakesavaswami, that the Board could not frame a scheme for a temple not in existence nor could the lands which were of inam nature be held to be property of the temple as they were service inams held on condition of Archakatvam service, etc. As the inam was by its terms only to enure only so long as the temple existed, it was open only to the state to have resumed it when the old temple ceased; but by the date of the inam commission a new temple had been built and the worship of Vishnu (under whatever name) was being carried on there. The authorities therefore did not think it proper to

* Appeal No. 254 of 1934. 19th February, 1937.
A. A. O. No. 321 of 1932.

Board of Commissioners for H.R.E., Madras *v.* P. Veeraraghavacharlu.

resume the inam but preferred to allow it to be used for the conduct of the worship in the newly built temple and accordingly confirmed the inam. The lower Court held that the Board had no jurisdiction to frame a scheme in the circumstances and also decided that issues relating to the title of the properties should have been excluded from the subject-matter before it,

Held, (1) the lower Court being a Court of plenary jurisdiction ought to have decided issues as to title.

(2) that the Religious Endowments Board could deal with a question of disputed title [*Anjaneya Sastri* v. *Kothandapani Chettiar,* (1935) 43 L.W. 409: A.I.R. 1936 Mad. 449] as it would not be possible to frame a scheme without coming to some conclusion as to the income of properties or as to the properties to be managed. [See *Chotalal Lakhmiram* v. *Manohar Ganesh,* (1899) L.R. 26 I.A. 199: I.L.R. 24 Bom. 50 at 54 (P.C.).]

(3) that the principle of the legal personality of an idol and of the vesting of properties in such personality could not be taken quite literally. Observations as to that effect made by the Judicial Committee in some cases, were only with a view to emphasise the idea that the endowments of a temple are not vested in the trustees but only managed by them. The judgments delivered in *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra,* (1909) I.L.R. 37 Cal. 128 at 140, 153, 155, 160 and 168 (F.B.), point out the limitations to that theory of vesting and the incongruities to which a literal adherence to it must lead.

(4) that as the inam was by its terms one to enure only so long as the temple existed, it was open to the state to resume it when the old temple ceased to exist. The authorities did not think it right to resume the inam but preferred to allow it to be used for the conduct of the worship in a newly built temple and accordingly confirmed it. It would be an unnecessary importation of legal fiction to ignore these broad facts and to hold that the disappearance of a particular image from the temple (whether before or after the inam proceedings) had the effect of disannexing the inams from the existing temple, though worship continued to be carried on in it for the benefit of the villagers.

Hindu Religious Endowments, Madras v. *Rukmini,* (1932) 62 M.L.J. 594: I.L.R. 55 Mad. 636, distinguished.

Appeal against the decree of the District Court of Guntur in O. S. No. 8 of 1932 (O. S. No. 19 of 1929 on the file of the District Court, Kistna).

P. V. Rajamannar and *K. Subba Rao* for Appellant.

V. Rangachari for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This is an appeal by the Madras Hindu Religious Endowments Board against a decree of the District Court at Guntur cancelling a scheme framed by the Board in 1929 for the proper administration of the affairs of a Vishnu temple at Manthena, a village in the Gannavaram Taluq of the Kistna District. The scheme purported to deal with the temple as the temple of Sri Gopalaswami (or Venugopalaswami) and it vested certain properties in trustees to be appointed for the

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temple. The plaintiffs (respondents 1-3) who were in possession of these properties raised a contention, even before the scheme was framed, that the temple of Gopalaswami in that village had fallen into ruins before 1819, that there is no such temple now in existence and that the Board was confusing it with the temple now in existence which was built by the villagers between 1819 and 1847 and dedicated to a different deity named Chennakesavaswami. Relying on the decision in *Hindu Religious Endowments, Madras* v. *Rukmini*[1], they contended that the Board had no jurisdiction to frame a scheme for a temple which had ceased to exist or to deal with endowments alleged to belong to such a temple. As regards the properties in question, they contended that they were or had become absolutely entitled thereto in their own right, that the existing temple had no manner of right to these properties, and that in any event, the inam (which according to them comprised only the melwaram) should not be held to be the property of the temple as it was their own service inam held on condition of Archakatvam service. As the Board framed a scheme, ignoring the above contentions, the plaintiffs filed this suit under S. 57 (3) of the Madras Hindu Religious Endowments Act of 1927, praying for the cancellation of the scheme or its modification by the omission of all the provisions therein relating to the *A*, *B* and *C* scheduled lands and for an injunction restraining the Board and the Temple Committee from putting the scheme into force.

The plaint repeated the contentions above summarised. The written statement filed by the Board denied that:

"The suit temple became extinct before Fasli 1229"

And added that:

"Its existence was recognised by the Inam Commissioner and it exists even to-day".

Neither the denial nor the averment about the 'suit temple' is very informing. It was not the case of the plaintiffs that there was no Vishnu temple in existence in the village, but they contended that the temple of Gopalaswami with which the Board purported to deal had long ago ceased to exist and that the newly built temple now found in the village belonged to another deity known as Chennakesavaswami. Relying on references made in some documents even to the existing temple

1. (1932) 62 M.L.J. 594: I.L.R. 55 Mad. 636.

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as Gopalaswami temple, the Board at one stage of this litigation maintained that such description of the temple was right; but it was later on conceded on its behalf, that the suit might be proceeded with on the footing that the idol now found in the temple is that of Sri Chennakesavaswami. This difference in the embodiment of the deity has all along been insisted on by the plaintiffs as involving important legal consequences. The allegations in the plaint as to the plaintiffs' title to the suit properties and as to the nature of their interest in the said properties were also traversed by the written statement.

A large number of issues were framed by the District Judge of Kistna, when this suit was pending on his file with a number of similar suits. Later the suit went to the District Court of Guntur where the issues seem to have undergone revision. One District Judge (Mr. P. C. Lobo) before whom the case came on for trial ruled that:

"Questions of title to the inams are foreign to the scope of the suit under S. 57 (3) of the Religious Endowments Act, because the Board itself could not adjudicate on such questions under the guise of settling schemes".

Mr. Chandrasekhara Aiyar who finally heard the suits accordingly restricted himself to the issues numbered by him as XX (*a*), (*b*) and (*c*). We may observe in passing that even sub-heads (*b*) and (*c*) do raise the question of the title to the properties; further the discussion of sub-head (*a*), though it purports to raise only a question of jurisdiction, involves as will presently appear, a consideration of the title to the suit lands. Once it was found that the old temple of Gopalaswami had ceased to exist and that the idol in the present temple was that of Chennakesavaswami, the learned District Judge came to the conclusion that the existing temple is a 'new institution', one 'entirely different from the old temple' and on that footing he held that the principle of the decision in *Hindu Religious Endowments Board, Madras* v. *Rukmini*[1] would come into operation:

"The scheme must go 'he said' as having been framed to govern a non-existing temple".

Towards the end of the judgment, he also recorded findings to the effect that the subsequently constructed temple of Sri Chennakesavaswami 'has nothing to do with the suit inams' and that the plaintiffs were not estopped from denying

1. (1932) 62 M.L.J. 594: I.L.R. 55 Mad. 636.

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the continuance of Gopalaswami temple or the continuance of their services in a temple of that name.

We are not able to concur in the view taken by the lower Court that the principle of *Hindu Religious Endowments Board, Madras* v. *Rukmini*[1] is applicable to the circumstances of the present case. There was in that case no temple in existence at the time the Board tried to exercise its powers and this Court held that the Board could not claim to exercise control over certain *properties*, merely on the ground that they were attached to a temple once upon a time. It will be noticed that the learned Chief Justice took care to restrict his observations to a case where the temple had permanently ceased to exist and there was no apparent intention of bringing it into existence again. Here, we have a Vishnu temple admittedly in existence in the village and there can be no doubt that it is the management of *this* temple that the Board intended to regulate by the proposed scheme. The description of the temple as that of 'Gopalaswami' could in other circumstances have been overlooked or rectified as at best a mere misdescription; the real matter in controversy between the parties is as to whether the Board was entitled to treat the suit inams as belonging to the *existing* temple, when framing a scheme for the administration of the temple and its endowments. This way of stating the point for decision must itself suffice to show the inappropriateness of wholly excluding questions of title from the purview of proceedings before the Board or before the Court in relation to schemes for the management of temples; indeed it seems to us impossible to exclude questions of title. The allegations in the plaint and the issues framed in this case raises intricate points bearing upon the question of title; and unless the Court is to avoid deciding the real point in controversy between the parties, we do not see how these issues can be struck out. The suit is after all one filed in a Court of plenary jurisdiction and though its institution became necessary because of the framing of a scheme by the Board, we do not see in that circumstance sufficient justification for the view that the trial of the suit must be limited in the manner laid down in the judgment of the lower Court. Even as regards the power of the Board, it seems to us incorrect to say that it cannot deal with a question of disputed title. As observed in *Anjaneya Sastri* v. *Kothanda-*

1. (1932) 62 M.L.J. 594: I.L.R. 55 Mad. 636.

pani Chettiar[1] it may not always be possible to frame a scheme without coming to some conclusion as to the income available or as to the properties to be managed. (See also *Chotalal Lakhmiram* v. *Manohar Ganesh*[2] and A. S. No. 189 of 1931.) Any view taken by the Endowments Board cannot of course affect third parties in hostile possession of the properties nor can it always be *final* even as against parties appearing before the Board. The Civil Court cannot in any view decline to adjudicate on the question of title when it is raised before it. We have accordingly heard arguments on the question whether the suit inams can be held to belong to the existing temple of Sri Chennakesavaswami.

We may briefly dispose of the plaintiffs' claim of absolute private right, based on the alleged grant from the Zamindar or from Mr. Russell. The lower Court has rightly declined to accept the story of a recognition by Mr. Russell of a private right to the property in the plaintiff's predecessors, after the destruction of the old temple. No such claim was put forward during the inam enquiry and the confirmation of the inam to the temple negatives the truth of this basis of claim. Any documents obtained by the plaintiffs' predecessors from the Zamindar's officials after the date of the permanent settlement (for example, Exs. E, K and L), whether on some representation as to the alleged order of Mr. Russell or otherwise, cannot affect the right of the temple to the inam. Though the inam was granted by Raja Apparao, the grant was made by the Raja at a time when he represented the sovereign power; after the permanent settlement, his successors had no power to interfere with pre-settlement devadayam inams. The plaintiffs' claim of prescriptive title is equally untenable. They and their predecessors-in-title have admittedly been all along Archakas in charge of the existing temple and there have been no other trustees; the result is that if the inams could otherwise be regarded as belonging to this temple, it is not open to them to plead that their possession was adverse to the temple.

The contention mainly pressed on us on behalf of the plaintiffs accordingly was that the suit inams were not granted or confirmed to Chennakesavaswami and as this idol is a different juridical person from the old idol (of Gopalaswami) which

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1. (1935) 43 L.W. 409: A.I.R. 1936 Mad. 449.
2. (1899) L.R. 26 I.A. 199: I.L.R. 24 Bom. 50 at 54 (P.C.).

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had disappeared, this idol cannot claim to be the owner of properties which once belonged to the other idol. It has not been suggested that the destruction of the old idol or of the old temple had the effect in law of putting an end to the Devadayam character of the inam (*Bhupati Nath Smrititirtha* v. *Ram Lal Maitra*[1]) but it has been argued that property belonging to one idol cannot be claimed by a new idol unless it has been consecrated with the same name. This contention seems to us to ignore the effect of the inam proceedings and rests on a too literal interpretation of the observation of the Judicial Committee to the effect that the endowments of a temple are in an 'ideal' sense vested in the idol.

While it is fairly certain that the old temple ceased to exist somewhere about 1819, the evidence does not enable us to find definitely when the old idol, that of Venugopalaswami, ceased to be worshipped. Ex. C of 1847 mentions that in the newly constructed temple the "Image of Chennakesavaswami Varu has been installed". But, in the inam papers of 1859 and 1860 reference continues to be made to Gopalaswami Varu even while the destruction of the old temple and the construction of a new one are noted. Some of the inam papers purport to be signed by one Vuppuluri Anthayya who has also signed Ex. C. It cannot therefore be said that the statement in the inam papers must be the result of ignorance; nor do we see sufficient reason for attributing any fraudulent purpose to anybody and assuming that a false statement must have been made. In Ex. XIV, column (2) the person then in enjoyment of the inam (admittedly a predecessor in title of the plaintiffs) is described as "Archaka of Sri Gopalaswami Varu". It was suggested by respondents' learned Counsel that this might be read as merely meaning that he was *formerly* the archaka of that deity when that deity was in existence. We do not think that that will be a fair reading of the document, because column (5) clearly implies that Gopalaswami Varu was regarded as the *present* enjoyer. Ex. IV mentions in column (8) that the pagoda was then well kept up and there again, it is referred to as Gopalaswami pagoda. The recommendation of the inam authorities was that the inam might be confirmed to the pagoda and that

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1. (1909) I.L.R. 37 Cal. 128 at 131 and 167 (F.B.).

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was accordingly done. This can only mean that the authorities confirmed it in favour of the existing pagoda. In Ex. C, there is a reference among the heads of remuneration to be received by the archaka, to "income arranged in the village". We cannot agree with the contention that this merely refers to the two heads next described. We rather think that it is an independent head and in all probability refers to the suit inams. There can thus be no reasonable doubt that in 1860 these inams were being enjoyed by the archakas as being attached to the suit temple and that the worship therein was described as the worship of Sri Venugopalaswami.

The learned District Judge found it difficult to say when the idol of Venugopalaswami ceased to be worshipped in the village. Referring to the existence of a broken image of Venugopalaswami at a distance of a furlong or a furlong and half from the temple, he observes that:

> "It is possible that this image gave the original name to the temple and it may be that this idol was the presiding deity at one time in the premises occupied by the present temple and that it had to be cast away as it happened to become mutilated by accident or design".

He is however unable to fix the time when this might have happened; nor does he feel sure whether the present temple was built on the site of the old temple or in another place. But, as already stated, he was of opinion that the case could be decided on the footing that with the disappearance of the old temple and the old idol, the old institution ceased and that the present temple must be regarded as a *new* institution. He strongly condemned the attempts of the plaintiffs and their predecessors to disannex the suit inams from the religious purposes for which they were intended; but he felt reluctantly obliged to come to the conclusion that the new temple could not claim title to the suit inams. In this state of the record, we propose to deal with the question of title on both hypotheses, namely, that the idol of Gopalaswami might have ceased to be worshipped even prior to the inam enquiry (indeed prior to the construction of the inam enquiry) or its worship might have come to an end only after 1860. This latter alternative would, in the light of Ex. C, imply that both the idols, namely, that of Gopalaswami and of Chennakesavaswami must for some time have been worshipped in the existing temple.

Turning now to the contention advanced on behalf of the plaintiffs that, as Sri Chennakesavaswami was according to the

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Agama Sastras a different manifestation of the deity from Sri Venugopalaswami, the two idols must be regarded as different juridical persons and that no claim could be made by or on behalf of Sri Chennakesavaswami to the inams which had been granted for the worship of Sri Venugopalaswami, we may state that we are prepared to assume that according to the Agamas there are well-recognised distinctions based on *murti-bheda* (difference of form) with corresponding difference in the *Dhyanasloka* (the manner of contemplation). But we are not prepared to hold that from this difference the legal result contended for, on behalf of the plaintiffs, necessarily follows. The principle of the *legal* personality of an idol and of the vesting of property in such personality cannot be taken quite literally. Observations to that effect were made by the Judicial Committee in some cases, only with a view to emphasise the idea that the endowments of a temple are not *vested* in the trustees but are only *managed* by them. The judgments delivered by the Full Bench in *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra*[1] point out the limitations to that theory of vesting and the incongruities to which a literal adherence to it must lead. As explained in that case, the purpose of making a gift to a temple is not to confer a benefit on God but to confer a benefit on those who worship in that temple, by making it possible for them to have the worship conducted in a proper and impressive manner. This is the sense in which a temple and its endowments are regarded as a *public* trust. (See *De Souza* v. *Vaz*[2].)

Looking at the facts of this case from that point of view, the true position is that as the inams in question were granted by the then sovereign authority for the conduct of 'Nitya Naivedya and Deeparadhana' in the Vishnu temple then in existence in the suit village, the grant was in substance one intended to afford facilities for the residents of the village to carry on the worship of Vishnu. As the inam was by its terms one to enure only so long as the temple existed (*see* Col. 10 of Ex. F), it was open to the state to resume it when the old temple ceased to exist. But, by the date of the Inam Commission enquiry, a new temple had been built and the worship of Vishnu (under whatever name) was being carried

1. (1909) I.L.R. 37 Cal. 128 at 140, 153, 155, 161 and 168 (F.B.).
2. (1887) I.L.R. 12 Bom. 137.

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on there. The authorities did not therefore think it right to resume the inam but preferred to allow it to be used for the conduct of the worship in the newly built temple and accordingly confirmed the inam. It seems to us an unnecessary importation of legal fiction to ignore these broad facts and to hold that the disappearance of a particular image from the temple (whether before or after the inam proceedings) had the effect of disannexing the inams from the existing temple, though worship *continues* to be carried on in it for the benefit of the villagers. We set aside the finding of the lower Court on this point.

In the result, the appeal is allowed, the decree of the District Court is set aside and the suit is remanded to that Court for trial and disposal, in the light of the foregoing observations. Costs to abide. Refund of stamp duty on the *memorandum* of appeal.

C. M. A. No. 321 of 1932.

We understand that in view of the pendency of A. S. No. 254 of 1934, this C.M.A. was not remanded, when the rest of the connected batch were remanded. (See *Ramiah* v. *Hindu Religious Endowments Board, Madras*[1].) Now that we are remanding the main suit itself, this miscellaneous appeal will also be remanded to the lower Court to be dealt with in the light of the decision in *Ramiah* v. *Hindu Religious Endowments Board, Madras*[1] and of our observations in the judgment just delivered in A.S. No. 254 of 1934. Costs to abide.

At the request of the respondents' learned Counsel we wish to make it clear that we have not decided or even heard arguments on the question whether inam was granted to the temple or to the archaka. That is raised by one of the issues in the case and will be dealt with by the lower Court in due course. We have only dealt with so much of the case as raised the question whether the present temple can claim the inams at all, even if it be assumed that the inams had been granted to the old temple.

K. C. —— *Appeal allowed.*

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1. (1934) 68 M.L.J. 494: I.L.R. 58 Mad. 764.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

The Official Receiver, Trichinopoly .. *Petitioner** (*Petitioner*).

v.

Muhammad Meera Saheb and another .. *Respondents* (*Respondents*).

Official Receiver, Trichinopoly *v.* Muhammad Meera Saheb.

Provincial Insolvency Act (V of 1920), Ss. 55 and 75—Insolvent preferring a creditor—Ultimate object of securing advantage to insolvent—Whether fraudulent preference—The circumstance that in fact the insolvent failed to secure benefit cannot change the rule of law.

Where a mortgage by an insolvent was found to be not the result of a desire or intention on the part of the insolvent to prefer the second respondent but the result of pressure from the creditor and also of a desire on the part of the insolvent to secure a certain benefit to himself and the form in which the transaction was put through was that the document was executed not directly by the insolvent but the first respondent to whom the insolvent by a document of even date purported to sell the last part of his property making it part of the consideration for the sale that the transferee should pay one of the debts due from the insolvent to the second respondent, and when it was found that the pressure of the creditor was not a feigned one but really genuine,

Held, (1) that the two documents should be looked into together and that as far as the mortgage which the insolvent got first respondent to execute in favour of the second respondent was the result of a pressure and that the insolvent's purpose in getting through this set of transactions was to secure if possible some advantage to himself.

(2) that where an insolvent does an act not mainly with a view to prefer a creditor but with a view to securing some benefit real or fancied for himself the transaction will not be set aside on the ground of fraudulent preference though in fact it may amount to preference.

In re *Arnott*: Ex parte *Barnard*, (1889) 6 Morr. 215, followed.

The fact that in most of the cases in favour of the above view the insolvent did in fact succeed in getting the extra advantage whereas in the present case he has failed to secure it, ought not to make a difference in the rule of law.

Petition under S. 75 (1) of the Provincial Insolvency Act, praying the High Court to revise the order of the District Court of Trichinopoly dated 15th January, 1934, and made in C.M.A. No. 88 of 1933 preferred against the order of the Court of the Subordinate Judge of Trichinopoly dated 31st August, 1933, and made in I.A. No. 10 of 1933 in I.P. No. 45 of 1931.

T. V. Muthukrishna Aiyar for Petitioner.

S. T. Srinivasagopalachariar for Respondents.

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* C.R.P. No. 15 of 1935. 26th April, 1937.

Official Receiver, Trichinopoly *v.* Muhammad Meera Saheb.

The Court delivered the following

JUDGMENT.—In this case I am asked under S. 75 of the Provincial Insolvency Act to set aside the decision of the Courts below which upheld a mortgage (Ex. I) in favour of the second respondent. The circumstances of the case clearly invite scrutiny; but, after an investigation, both the Courts have held that the transaction was not the result of a desire or intention on the part of the insolvent to *prefer* the second respondent but the result of pressure from the creditor and also of a desire on the part of the insolvent to secure a certain benefit to himself. I do not find myself in a position to say that this concurrent finding is vitiated by any underlying error of law or misdirection.

Ex. I was put through in a form not always adopted in that it was executed not directly by the insolvent but by the first respondent to whom the insolvent by a document of even date purported to sell the last part of his property, making it part of the consideration for the sale that the transferee should pay one of the debts due from the insolvent to the second respondent. There can be little doubt that a sum of Rs. 1,000 at least was due from the insolvent to the second respondent, and probably another sum of Rs. 700 was also due to her under two other transactions. I see no reason to doubt the correctness of the finding that pressure and indeed genuine pressure was brought to bear on the insolvent on behalf of the second respondent. It has no doubt been held that in certain circumstances, the pressure from the creditor may be feigned or purposeless and in such cases the mere appearance of pressure will not prevent a transaction being a fraudulent preference. But I have no reason to think that in this case that was the situation. Whether the insolvent was at the time of that transaction actually in insolvent circumstances or not, it does not appear that he or his creditors thought that the insolvency was inevitable. This is shown by the fact that the second respondent herself filed a suit against him subsequent to the date of Ex. I, on another promissory note and other creditors of the insolvent also instituted suits and applied for attachment before judgment. It is in this connection that the method adopted by the insolvent is also of some significance. He purported to transfer most of his properties to the first respondent for a sum of Rs. 2,500 and both the Courts

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have found that the object of this transaction was to enable the insolvent to secrete at least a sum of Rs. 900 or portions of the property worth that amount, for his own advantage. Considering these facts in the light of the rule that where an insolvent does an act not mainly with a view to prefer a creditor but with a view to securing some real or fancied advantage to himself the transaction will not be set aside on the ground of fraudulent preference though in fact it may amount to a preference. I think the Courts below were justified in coming to the conclusion that the two documents must be looked upon as part of one and the same transaction and that so far as the mortgage which the insolvent got executed by the first respondent in the second respondent's favour is concerned, it was the result of a pressure and that the insolvent's purpose in going through this set of transactions was to secure if possible some advantage to himself.

In some of the cases cited, it has no doubt happened that the advantage was obtained by payment of additional cash, by the preferred creditor himself. (Cf. *Ramaswami* v. *Chinnathambi*[1] and *Gangappa* v. *Official Receiver, Bellary*[2].) But this I think is not a part of the rule itself, but only a matter of detail. In In re *Arnott*: Ex parte *Barnard*[3] the arrangement between the insolvent and the preferred creditor was that the preferred creditor should raise from elsewhere a sum of money on the security of the property and give it to the debtor. This was considered by Cave, J., to be sufficient to bring the case within the rule that the dominant object of the insolvent was to secure his own benefit. I may also add that the circumstance that in most of the reported cases, the insolvent did in fact succeed in getting the extra advantage whereas in the present case he has failed to secure it, ought not to make a difference in the rule of law. Here again a decision in In re *Arnott*: Ex parte *Barnard*[3] is itself a relevant authority because it happened in that case that the extra loan of £250 stipulated for was in fact not paid over by the solicitor to the insolvent before the Act of Bankruptcy was committed and was ultimately directed by the Court to be paid by into the hands of the Receiver.

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1. A.I.R. 1932 Mad. 459. 2. A.I.R. 1935 Mad. 300.
3. (1889) 6 Morr. 215.

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In the above view, it is unnecessary to consider whether in the circumstances of the present case, it will be possible to treat the second respondent as *bona fide* transferee for value from one who took a transfer which is itself voidable under S. 53 of the Provincial Insolvency Act. Though there is no clause to be found in S. 53 corresponding to the second clause of S. 54, the reason for the difference has been explained in In re *Vansittart*: Ex parte *Brown*[1] and following that decision, it has been held in several cases that a second transferee who *bona fide* takes a transfer for value from one whose transfer offends S. 53 may invoke the protection of the equitable rule in favour of transferees for value without notice. (*See* In re *Brall*: Ex parte *Norton*[2], In re *Carter and Kenderdine's Contract*[3], In re *Hart*: Ex parte *Green*[4] and *Amir Ahmad* v. *Saiyid Hasan*[5].) It is possible in view of the above observations in In re *Vansittart*: Ex parte *Brown*[1] that this principle can be invoked only by a person who has parted with consideration *subsequent* to the date of the transfer by the insolvent to the intermediate transferee; but it is unnecessary to pursue that question in the present case.

The revision petition fails and is dismissed with costs of the second respondent.

K. C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

T. Sivasankaram Pillai .. *Appellant** (*Plaintiff*)

v.

Agali Narayana Rao .. *Respondent* (*Respondent-Defendant*).

Sivasankaram Pillai *v.* Narayana Rao.

Evidence Act (I of 1872), S. 62—Letter typed with copies—Signature to letter and initials to copies—None of the copies can be primary evidence of the contents of the original.

In order to bring a matter under S. 62 of the Evidence Act the whole document with the signature, if there is any, must have been made by the uniform process within the meaning of the explanation to that section. But where a letter addressed to the Government was typed along with copies and while the signature of the writer was added to it, to the typed copy only the initials of the writer were added, the copy and the original could not be proved to have been made by one uniform process and as such the copy could not be a primary evidence of the contents of the letter.

1. (1893) 2 Q.B. 377.
2. (1893) 2 Q.B. 381.
3. (1897) 1 Ch. 776.
4. (1912) 3 K.B. 6.
5. (1935) I.L.R. 57 All. 900.

* S. A. No. 556 of 1933. 19th April, 1937.

Sivasankaram Pillai v. Narayana Rao.

Second appeal against the decree of the District Court of Anantapur in A. S. No. 102 of 1932 preferred against the decree of the Court of the District Munsif of Penukonda in O. S. No. 169 of 1930.

S. Ranganadha Aiyar for Appellant.

V. S. Narasimhachariar for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit instituted by the plaintiff for damages for an alleged libel in a letter dated 4th February, 1929, addressed by the defendant as President of the Taluk Board, Penukonda, to the Secretary to Government, Local Self-Government Department, Madras. On a summons to produce the said letter, the Government sent it in a sealed cover and pleaded privilege under S. 124 of the Indian Evidence Act. Both the Courts upheld the privilege. The plaintiff then sought to let in evidence of the contents of the letter by filing Ex. A which purports to be a copy of the said letter containing the initials of the defendant. This document was produced from the office of the Taluk Board as a summons for production in a criminal case and it was sought to be made use of for the purpose of this case by the plaintiff. Both the lower Courts took the view that as the original could not be admitted in evidence on the ground of privilege, no secondary evidence of its contents could be given and therefore declined to rely on Ex. A and dismissed the suit as there was no evidence before the Court of the alleged libel.

Mr. Ranganadha Aiyar on behalf of the plaintiff does not dispute the proposition that where the original of a document could not be admitted in evidence on the ground of privilege no secondary evidence of its contents can be given; but he argues that Ex. A itself is the original as it contains the initials of the defendant. For this purpose he relies on S. 62 of the Indian Evidence Act, S. 62, Explanation 2 of the Act runs thus:

"Where a number of documents are all made by one uniform process, as in the case of printing, lithography, photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original".

The contention is that Ex. A and the letter sent to the Government were all made by one uniform process, namely, by typing on a type machine, and as it contains the initials of the

President, Ex. A itself is also the original. It seems to me that this contention proceeds on a misapprehension of the said explanation. It is no doubt true that the contents of both the letter addressed to the Government and Ex. A were made by one uniform process, namely, typing but without the signature of the President they cannot constitute a letter and therefore a document within the meaning of the said explanation. It is after the contents of the letter had been typed that the defendant signed the document which was addressed to the Government and then initialled Ex. A, which was kept in the Taluk Board Office. Therefore the signature on the document addressed to the Government and the initials on Ex. A could not be said to have been made by one uniform process. The whole document with the signature must have been made by one uniform process within the meaning of the explanation which is not the case here. The document that was sent to the Government must be treated as the original as it constitutes the communication between the parties, that is, the defendant and the Government and it is clear from the plaint that what is complained of is the communication contained in that letter. I must therefore overrule the contention of Mr. Ranganadha Aiyar.

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I fail to see why the plaintiff has involved himself in this litigation, as on a reading of the entire letter it seems to me there is nothing libellous against him. It is unnecessary to give a decision on this matter in the view I have taken of the admissibility of Ex. A.

In the result, the second appeal fails and is dismissed with costs. Leave refused.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

M. S. Ponnuswamy Aiyar .. *Petitioner* (Accused).*

Criminal Procedure Code (V of 1898), S. 345 (1) and (2)—Compoundable offence—Nature of.

Ponnu-swamy Aiyar, *In re.*

Composition under S. 345 (1) is an act of the parties which requires no permission. Nor is there any language to restrict its completion to any particular time. Under S. 345 (2) there must be a prosecution pending and the permission of the Court must be given. Any act of the parties, done before the prosecution has begun and without reference to any Court, cannot

* Cr. R. C. No. 205 of 1937. 28th July, 1937.
(Cr. R. P. No. 193 of 1937).

Ponnuswamy Aiyar, *In re.*

be a composition under the sub-section and whatever may be the civil rights to which it may give rise can have no effect on the trial.

Where an offence was said to have been committed under S. 337, Indian Penal Code, which falls under S. 345 (2), Criminal Procedure Code, as one compoundable with the permission of the Court, but during the trial the accused produced a receipt said to have been given by the father of the complainant for the sum of Rs. 50 and alleged that the latter had agreed not to prosecute him and the Magistrate refused to take evidence on the question of fact on the ground following *Naurang Rai* v. *Kidar Nath,* (1928) I.L.R. 9 Lah. 400, that whether proved or not the offence could not be compounded under S. 345 (2).

Held, that the Magistrate was right.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session, East Tanjore Division at Negapatam dated 2nd February, 1937 and made in Criminal Revision Petition No. 2 of 1937 (C. C. No. 406 of 1936 on the file of the Court of the Stationary 2nd Class Magistrate, Shiyali, C. C. No. 829 of 1936 Stationary 2nd Class Magistrate, Mayavaram).

R. Swaminatha Aiyar for Petitioner.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—The petitioner here is the accused in C. C. No. 406 of 1936 on the file of the Stationary 2nd Class Magistrate, Shiyali, and the offence which in the complaint he is said to have committed is one under S. 337, Indian Penal Code, which falls under S. 345 (2), Criminal Procedure Code, as one compoundable with the permission of the Court. During the trial he produced a receipt said to have been given by the father of the complainant for the sum of Rs. 50, and alleged that the latter had agreed not to prosecute him. It was denied for the prosecution that any such payment was made. The Stationary 2nd Class Magistrate refused to take evidence on this question of fact on the ground that whether it were proved or not, the offence could not be compounded under S. 345 (2). In so deciding he followed *Naurang Rai* v. *Kidar Nath*[1].

On revision the learned Sessions Judge of East Tanjore held that this view was wrong, and that in normal circumstances the Stationary 2nd Class Magistrate should have followed not *Naurang Rai* v. *Kidar Nath*[1] but *Kumaraswami*

1. (1928) I.L.R. 9 Lah. 400.

Ponnuswamy Aiyar, *In re.*

Chetty v. *Kuppuswami Chetty*[1]. However as it was not the complainant himself in this case but the complainant's father who is said to have agreed not to prosecute, his action cannot be recognised as a valid composition in view of the provisions of S. 345 (4).

It seems to me that both Courts have come to the correct final decision but that the reasoning of the Stationary 2nd Class Magistrate should be preferred. The learned Sessions Judge observes that a Court in Madras must follow this High Court instead of some other High Court but that is only if this High Court has dealt with a case exactly in point. *Kumaraswami Chetty* v. *Kuppuswami Chetty*[1] is not exactly in point as it deals with offences under Ss. 355 and 323, Indian Penal Code, both of which are compoundable under S. 345 (1), Criminal Procedure Code, that is, without the requirement of any permission by the Court. The learned Sessions Judge relies only upon a single sentence of the judgment which is somewhat ambiguously expressed, and is actually quoted by the judges of the Lahore High Court in support of their own view. The Stationary 2nd Class Magistrate was quite right therefore in following *Naurang Rai* v. *Kidar Nath*[2].

Apart from rulings, the matter seems very clear on the language of the section. Composition under S. 345 (1) is an act of the parties which requires no permission. Nor is there any language to restrict its completion to any particular time. Under S. 345 (2) there must be a prosecution pending and the permission of the Court must be given. Any act of the parties done before the prosecution has begun and without reference to any Court cannot be a composition under this sub-section, and whatever may be the civil rights to which it may give rise can have no effect on the trial.

For these reasons this Criminal Revision Case is dismissed.

K. C. *Petition dismissed.*

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1. (1918) 34 M.L.J. 217 : I.L.R. 41 Mad. 685.
2. (1928) I.L.R. 9 Lah. 400.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE LAKSHMANA RAO.

Chelikani Jagannadharao and another .. *Appellants** (*Petitioners-Defendants 1 and 2*)

v.

Merla Ramanna and others .. *Respondents* (*Decree-holder and Defendants 3 and 4*).

Jagannadharao *v.* Ramanna.

Hindu Law—Joint family—Partition—Severance of status—Declaration of intention to separate—Need for communication to other members—Alienation of share in one item of family property to one of several coparceners—Effect—Inference as to agreement to divide—Blending of property—Property whether can be taken out subsequently.

Under the Hindu Law it is open to the members of a joint family to make a division and severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of the joint undivided family. No express agreement is necessary for this purpose, but the agreement must be between all the coparceners and the intention to become divided must be communicated to all the other coparceners. The mere fact that a coparcener makes an alienation does not put an end to the coparcenary between himself and the other members of the family. And an alienation by one of several members of a joint family to one other of his share in an item of the family property cannot effect a division so far as that property is concerned when there is no intimation of it to the other members of the family.

Case of transfer with the knowledge or consent of all the other members of the family distinguished.

Kamepalli Ayilamma v. *Mannem Venkataswamy*, (1917) 33 M.L.J. 746; *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*, (1914) 27 M.L.J. 409: I.L.R. 39 Mad. 265; *Narayana Sah* v. *Sankar Sah*, (1929) 57 M.L.J. 685: I.L.R. 53 Mad. 1 (F.B.) and *Lakshmi Achi* v. *Narayanasami Naicker*, (1929) 57 M.L.J. 746: I.L.R. 53 Mad. 188, considered.

Properties once brought into the common stock and blended with joint family property cannot be subsequently taken out.

Radhakant Lal v. *Nazma Begum*, (1917) 35 M.L.J. 99: I.L.R. 45 Cal. 733 (P.C.), relied on.

Appeal against the order of the Court of the Subordinate Judge of Cocanada dated 10th September, 1934 and made in E. A. No. 1931 in O. S. No. 120 of 1930.

Ch. Raghava Rao for Appellants.

T. R. Venkatarama Sastri, A. Satyanarayana, C. Rama Rao and *K. Bhimasankaran* for Respondents.

The Court delivered the following

Mockett, J.

JUDGMENTS. *Mockett, J.*—This is an appeal against an order passed by the learned Principal Subordinate Judge of

* A. A. O. No. 482 of 1934. 16th November, 1936.

Cocanada in an execution application. It will be seen from the geneological table that originally there were five branches of the family and they may be referred to as the first, second, third, fourth and fifth branches, the appellants' branch being the third. It is only necessary to add that Venkatarayanim Garu had four sons, Ramarayanim Garu one son and Bhavannarayanim Garu four sons whose names appear as signatories to Ex. H, a power-of-attorney. The first respondent by his execution application sought to attach some immovable property as being the separate property of Dharma Rao, the third branch. The appellants contend that their father Surya Rao *alias* Kasibabu and his brother Dharma Rao were undivided and that the properties of Dharma Dao devolved on them by survivorship and are not liable for the simple debt of Dharma Rao against whom the respondents have obtained a decree on a promissory note in a suit filed in 1930. The appellants and Dharma Rao's daughter are impleaded as being in possession of the assets of Dharma Rao. Kasibabu died in 1910 and Dharma Rao in 1929. The respondents base their case on Ex. B, a transfer of lands by Kasibabu to Dharma Rao, which they contend effects if not a total severance at least a severance so far as the properties thereby transferred are concerned. The appellants reply (whilst denying that Ex. B effects any severance) that at the most a partial severance would have been brought about and that if it were so Dharma Rao subsequently blended these properties with the rest of the joint family property so as to make them part thereof. They also contend that Ex. B was a nominal document not intended to be acted upon but brought about purely to put the properties out of Kasibabu's reach and thus prevent him from dissipating them (*vide* paragragh 7 in E. A. No. 772 of 1931). It is convenient to remark here that, although no issue as to blending was framed, the plea was specifically taken in paragraph 10 of the petition and the necessary materials for considering the plea are on record. I have had the advantage of reading my learned brother's judgment and agree with his conclusions on the facts that Ex. B was a nominal document and that the alternative plea as to blending has been substantiated by the appellants. I do not propose to add anything with regard to those aspects of the case. But in addition to these questions of fact the respondents raise an interesting point of law.

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The history of this family appears to be as follows: On 12th February, 1897, under Ex. TT-3 it is common ground that the fifth branch became separated from the four other branches but leaving them joint. In the schedule to Ex. TT-3 the joint family properties at that time are set out. Historically, Ex. B comes next as it was executed on 22nd March, 1900. It is undoubted that in 1900 the first, second, third and fourth branches were undivided. In 1908 under Ex. J-12, an entry in a note book of Dharma Rao, the four branches became divided in status but they continued to live so far as the properties were concerned as tenants in common until 1922 when under Ex. II dated 22nd November, 1922, the properties of the family were partitioned. These facts are not in controversy. So it will be seen that, although there was a division in status in 1908 between the four branches, there was no division of property till 1922 and in 1900 there was neither division in status nor division of property. But the respondents contend, and the learned Judge has so held, that Ex. B dated 22nd March, 1900, effected a separation. In paragraph 5 of the counter-petition the respondents plead that:

"Thereafter Dharma Rao became divided. The entire share of the property of Dharma Rao forms his separate property".

The learned Subordinate Judge holds as follows:

"Hence Ex. B in this case virtually effected the separation of Kasibabu. Whatever opinion one may have about its effect on the properties not covered by Ex. B or Ex. C, it is enough to say that, so far as the properties in question are concerned, they belonged to Dharma Rao wholly by virtue of Ex. B and that in respect of them Kasibabu became a separated member and could not have had any rights after 1900".

This finding is difficult to understand when the all-important fact is borne in mind that admittedly in 1900 the four branches were joint. The division therefore of Kasibabu must be from the rest of the family leaving Dharma Rao and the other three branches undivided. But a consideration of the judgment and the argument from the bar seems to suggest that what the respondents had in mind that there was a separation between Kasibabu and Dharma Rao alone. The niceties of these distinctions have been overlooked in the lower Court. An examination of Ex. B shows that, in the first place, it is in favour of Dharma Rao alone who is described as Kasibabu's elder brother; secondly, that there are no words therein which indicate any intention to divide; thirdly, that it appears to be a form of conveyance pure and simple of one-tenth of the

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joint properties belonging to the family as described thereunder; and fourthly, the list of the properties omits a large number of items which are contained in the schedule to Ex. TT-3 which is what purports to be a complete list of the joint family property. Mr. Venkatarama Sastri who appears for the respondents conceded that many items are not transferred by Ex. B; for example, the inam of the Jayanti people plots 4 to 21 on pages 8 and 9 of the schedule, plots 1 to 6 in Yerangudam village on page 10, and the plot in Garipatnam village on the same page. So Ex. B is a transfer by one member of a branch to another member of the same branch of one-tenth part of his interest in some items of the joint family property. I do not think that at the time of Ex. B Kasibabu had any idea of becoming divided. I think, to put it in simple language, that Kasibabu was at best intending to sell to Dharma Rao, the property referred to in Ex. B.

As the case presented to us has largely turned on the legal effect of Ex. B, it is necessary to consider the arguments relating to it. No case has been cited before us in which the facts are identical with those in the present case. As I understand Mr. Venkatarama Sastri's argument, it is this; that an alienation by one of several members of a joint family to one other of part of the property effects a division so far as that part of the property is concerned, even though no intimation of it is made to the other members of the joint family; and it must be emphasised that it has never been suggested that Dharma Rao represented the family as a whole. He rests his argument on the principle laid down in *Appovier* v. *Rama Subba Aiyan*[1] and *Ram Chunder Dutt* v. *Chunder Coomar Mundul*[2] and certain observations of Sadasiva Aiyar, J., in *Soundararajan* v. *Arunachalam Chetty*[3]. In both the decisions of the Judicial Committee it will be seen that the transfer is made with the consent and knowledge of all the members of the family, that is to say, that if it is shown that the members of an undivided family make among themselves a special agreement that certain specified property shall be the subject of shares, there is a division in status *quoad* the property specified therein, though no actual division is made. To quote Lord

1. (1866) 11 M.I.A. 75. 2. (1869) 13 M.I.A. 181.
3. (1915) 29 M.L.J. 793 and 816: I.L.R. 39 Mad. 159 at 178 (F.B.).

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Westbury in *Appovier* v. *Rama Subba Aiyan*[1]:

"When the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty although the property itself has not been actually severed and divided."

In *Suraj Narain* v. *Iqbal Narain*[2] their Lordships say that what may amount to a separation, or what conduct on the part of some of the members may lead to separation of a joint undivided Hindu family, and convert a joint tenancy into a tenancy in common, must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation; but to have that effect the intention must be unequivocal and clearly expressed. It must be remembered that Lord Westbury in *Appovier* v. *Rama Subba Aiyan*[1] had used the English analogy of the joint tenancy and tenancy in common, and in that case Lord Westbury goes on to say on the same page:

"Then if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject-matter. This may at any time be claimed by virtue of the separate right."

The most recent decision relating to this subject is to be found in *Lakshmi Achi* v. *Narayanasami Naicker*[3]. At page 195, Ramesam, J., referring to *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[4] remarks as follows:

"If a member of an undivided family sells the whole of his share in some of the family properties or part of his share in such properties but not in other properties, it may be that he continues undivided with the other members in respect of the properties other than those in which the whole or part of his share has been transferred. * * * It almost implies that so far as the properties in which the whole or part of the member's share is sold are concerned, he must be regarded as divided from the other members. But where the sale is not to a stranger but to the remaining members of the family the matter becomes much stronger."

The learned Judge then goes on to suggest that the authority of certain observations relating to a stranger-purchaser in

1. (1866) 11 M.I.A. 75 at 90, 92.
2. (1912) 24 M.L.J. 345: L.R. 40 I.A. 40: I.L.R. 35 All. 80 (P.C.).
3. (1929) 57 M.L.J. 746: I.L.R. 53 Mad. 188.
4. (1902) I.L.R. 25 Mad. 690 (F.B.).

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Maharaja of Bobbili v. *Venkataramanjulu Naidu*[1] are discounted by the decision of the Judicial Committee in *Girja Bai* v. *Sadashiv Dhundiraj*[2] but with all respect I do not understand how this is so. This latter decision of their Lordships lays down that a mere expression of a desire to divide clearly conveyed to the co-sharers effects a division in status regardless of whether the co-sharers desire it or not, but any subsequent partition can be effected either by agreement, or, in the absence of agreement, by invoking the aid of the Court. I am unable to see how any of the cases cited assists the respondents. The legal effect seems ultimately to come to this, that a sale to a stranger, while not affecting the status of the family, gives the stranger a right in a suit for general partition to have the transferor's share given to him, and that a statement of an unequivocal intention to divide which includes the filing of a suit or an agreement *inter se* effects a devision in status; but so far as the members of the family are concerned, it would seem that there must be contact by way of expression of intention between the transferor member and the rest of the family. Obviously as pointed out in the cases now quoted, the intention to divide with regard to a certain part of the property can be evidenced by a sale or an agreement regarding that property between the members of the family. But in this case none of those facts are present. It is nowhere suggested that Kasibabu gave any intimation of anything to the first, second and fourth branches. Ex. B was executed in favour of Dharma Rao and it has been held by Wallis, C.J. and Kumaraswami Sastri, J., in *Kamepalli Ayilamma* v. *Mannem Venkataswamy*[3] following the decision of the Judicial Committee in *Kawal Nain* v. *Prabhu Lal*[4] that the intention must be communicated to the co-sharers. At no time was it suggested until 1908 that Dharma Rao became divided with the other branches. Therefore in 1900 when Ex. B was executed no intimation, expressed or implied, of any intention was given to any one except Dharma Rao. At the most then it might be said that there was an intention to become divided from Dharma Rao alone, leaving presumably Kasibabu joint with the other branches. But as to this it is common ground that in 1900, Dharma Rao

1. (1914) 27 M.L.J. 409: I.L.R. 39 Mad. 265 at 268.
2. (1916) 31 M.L.J. 455: L.R. 43 I.A. 151: I.L.R. 43 Cal. 1031 (P.C.).
3. (1917) 33 M.L.J. 746.
4. (1917) 33 M.L.J. 42: L.R. 44 I.A. 159: I.L.R. 39 All. 496 (P.C.).

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was joint with the other branches, and it is not possible to understand how this legal position can be effected. An examination of Ex. II shows that the effect of Ex. B was never sought to be worked out, and the third share was confirmed in favour of Dharma Rao on behalf of his branch. The learned Counsel for the appellants has attacked the views of Ramesam, J., expressed in *Lakshmi Achi* v. *Narayanasami Naicker*[1] but it must be pointed out that the learned Judge when remarking that a sale not to a member of the family may make the matter much stronger is careful to use the words "to the remaining members of the family" and not to one of the remaining members of the family, and it seems to me that he had in mind the statement by Lord Westbury in *Appovier* v. *Rama Subba Aiyan*[2] where his Lordship particularly emphasises the effect of an agreement by members of an undivided family among themselves with regard to a particular property. A conveyance of lands between two parties is as clear an example of an agreement as can be given. I have already indicated my agreement with my learned brother's view that Ex. B was not a document which was intended to have any effect or was acted upon; but if that view should appear to be wrong, then I hold that, even if it gave any rights to Dharma Rao as against Kasibabu, it did not effect a division in status generally or partially between Kasibabu and Dharma Rao. It is to be noted that Dharma Rao does not appear to have ever attempted to enforce any rights against Kasibabu or his heirs. We have had the advantage of hearing a most comprehensive argument from the Bar, but no case—and many have been cited—has been cited establishing the proposition that a conveyance by one to one other of several members of a part only of his undivided share can effect a division as between the transferor and the transferee alone, nor has it, it would seem, ever been sought to be established until now.

For the above reasons and for the reasons given by my learned brother with which I concur it follows that this appeal must be allowed with costs throughout.

Lakshmana Rao, J.

Lakshmana Rao, J.—The appellants are the sons of Surya Rao *alias* Kasibabu, the predeceased younger brother of one Chelikani Dharma Rao *alias* Chinna Nayana who will hereafter be called Dharma Rao and the appeal arises out of an

1. (1929) 57 M.L.J. 746: I.L.R. 53 Mad. 188.
2. (1866) 11 M.I.A. 75 at 90.

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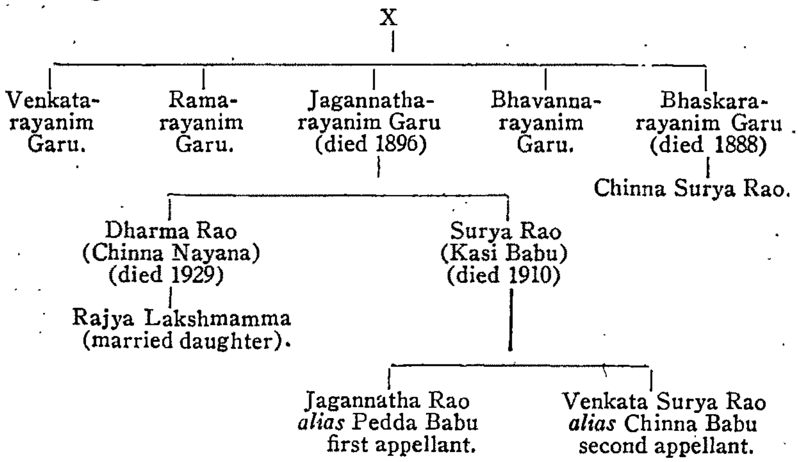
application by them to raise the attachment of certain properties in execution of the decree obtained by the first respondent, in O. S. No. 120 of 1930, on the file of the Subordinate Judge of Cocanada against the assets of Dharma Rao in their hands. The second and third respondents are the married question daughter and sister respectively of Dharma Rao, and the at issue is whether the properties attached are the assets of Dharma Rao or joint family properties which devolve on the appellants by survivorship.

The joint family, consisted originally of eight brothers and Jagannatharayanimgaru the grandfather of the appellants was the manager. Three of the brothers died without male issue and the pedigree of the surviving brothers who continued joint is given below:



Bhaskararayanimgaru died in 1888 leaving his widow Venkayamma and minor son Chinna Surya Rao, not to mention the female issue, and Venkayamma shifted with her children to her parent's house. Jagannatharayanimgaru died in 1896 and Dharma Rao succeeded him as manager. Partition was demanded by Venkayamma on behalf of her minor son in 1897 and by Exs. TT-1 to TT-3 of that year that branch became separated from the other four branches, leaving the latter joint. The share of Chinna Surya Rao in the movable properties, was given to Venkayamma on his behalf, but the immovable properties were left in the possession of the four branches, on the understanding that they should pay Rs. 45 per month out of the income of his one-fifth share to Venkayamma on his behalf, and apply the balance towards discharge of his one-fifth share of the family debts amounting to Rs. 82,554-13-5,

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The deeds provide for maintenance of correct accounts, and the arrangement was to continue until the four branches effect a partition among themselves or the minor Chinna Surya Rao attains majority. Two sets of accounts one for the five branches and the other for the four branches were maintained thereafter, and Dharma Rao continued in management. Properties were acquired by the four branches subsequently and Ex. B the sale-deed was executed by Surya Rao *alias* Kasi Babu, who will hereafter be called Kasi Babu, in favour of Dharma Rao on 22nd March, 1900, soon after attaining majority conveying his one-tenth share in a substantial portion of the family estate including the properties attached. The sale was admittedly in favour of Dharma Rao individually, and not as manager of the four branches, and the consideration is stated to be Rs. 12,500 made up of Rs. 6,500 and 2,000 the vendor's share of the joint family debt and father's debt, undertaken to be discharged by the vendee, Rs. 500, 400, 300 and 1,000, his personal debts and interest thereon amounting to Rs. 150 discharged out of the consideration, Rs. 1,000 received as earnest money, and Rs. 650 paid before the Sub-Registrar. The document was registered in the house and Kasi Babu continued in the family as before. He was married at the family expense and the four branches continued joint till November, 1908, when as appearing from the entry in Ex. J-12 the general note book of Dharma Rao, they became separated in status and mess. Three sets of accounts were maintained thereafter, namely, one for the five branches, one for the four branches and another called the *swantha* account of Dharma Rao which according to the appellants is the account of their branch, and Kasi Babu and his family continued with Dharma Rao. The income of the branch from the entire family estate was entered in the *swantham* account without any distinction being made between the properties conveyed and the other properties, and the household and other expenses of the branch were incurred therefrom. Ex. C the benami sale-deed of his share of the Bharatam or annual allowance payable by the Zamindar of Kolanka and another item of family property, was obtained from Kasi Babu by Dharma Rao in the name of his maternal uncle Tirupathirayanimgaru on 15th January, 1910, and Kasi Babu died soon after leaving a widow and two sons the appellants. The sales did not

exhaust the properties in which Kasi Babu was entitled to a share and the appellants and their mother continued to live with Dharma Rao. There was a revenue enquiry in 1912— regarding the record of rights in respect of the lands in patta No. 1 of Chitrada village, some of which are included in Ex. B the sale-deed, and in response to the notice issued to the members of the family, Mangiah the agent of the family under Ex. H the power of attorney dated 27th February, 1909, appeared before the Revenue Officer on 31st December, 1912. Ex. F his statement was recorded by the Revenue Officer, and Mangiah stated that Kasi Babu was a joint sharer in the patta and so the names of his minor sons Dharmarayanimgaru and Venkata Surya Rao Garu who were under the protection of their uncle Dharma Rao should be added with Dharma Rao as their guardian. He gave the names of one of the sons incorrectly and Ex. G the statement was filed by him on 3rd January, 1913, rectifying the error. It is stated therein that the mistake was pointed out by Dharma Rao, and by Ex. SS-3 the order dated 27th February, 1913, the Revenue Officer ordered the inclusion of the names of the appellants with Dharma Rao as their guardian. Nothing further happened till 1922 when by Ex. II the deed of partition the immovable properties specified in Exs. TT-1 to TT-3 which include properties not conveyed under Exs. B and C, were divided by metes and bounds between the five branches, and the third share which comprises the properties attached, was allotted to Dharma Rao. The deed is silent regarding the appellants who were apparently minors at the time under the protection of Dharma Rao, and there are yet other properties to be divided between the four branches. The appellants and their mother continued with Dharma Rao and he died on 28th August, 1929, leaving Ex. III the will dated 10th March, 1927, bequeathing the properties in question to the appellants and other properties to the second respondent.

The case of the appellants is that their father was leading a bad life, and Ex. B the sale-deed was brought about lest he should deal with and fritter away his share in the family properties for immoral purposes. There was otherwise no need or occasion for the sale-deed, nor was it supported by consideration. It was a nominal transaction, and the properties were treated as family properties throughout. Ex. C the benami sale-

deed was brought about for the same purpose, as in spite of married life, their father didnot improve and no distinction was at any time made between the properties covered by Exs. B and C and the other family properties or their income. There never was any division in fact between their father and Dharma Rao nor was any severance effected by Ex. B the sale-deed. Even otherwise the severance brought about would at best be partial and the properties conveyed were blended with the other joint family properties. They would therefore devolve on them by survivorship and are not assets of Dharma Rao.

The first and second respondents in their counters denied that Ex. B the sale-deed was a nominal transaction and contended that it effected a complete severance. The properties conveyed became the separate properties of Dharma Rao and they were not treated as family properties thereafter. The alleged blending was false and there was no other family property with which the properties conveyed could be blended. The mess too was not common and the subsequent treatment of Kasi Babu and his family by Dharma Rao was due to natural love and affection. This cannot confer any rights on them and the properties in question were allotted to Dharma Rao in the partition of 1922. They were thus separate properties and until the will was discovered to be void exception was not taken to the disposition. They are therefore assets of Dharma Rao and would not devolve on the appellants by survivorship.

The third respondent did not file any counter and the petition was posted for first hearing to 8th February, 1932. The appellants applied on 8th February, 1932, for the issue of a commission for the examination of certain witnesses, and the petitions were adjourned to 1st March, 1932. The commission was ordered on 1st March, 1932, and the main petition was adjourned to 8th April, 1932. A large number of documents were filed into Court on behalf of the appellants on 10th March, 1932, without notice to the respondents, and the office forwarded them to the Commissioner. Fourteen of them were marked in evidence in spite of objection during the examination of one of the witnesses before the Commissioner, and the decree-holder moved the Court to exclude the documents on the ground that they were not filed before the first hearing. The appellants contended that the procedure relating to suits

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was not applicable, but the Court ruled otherwise, and ordered, that barring 18 documents which by then had been admitted in evidence, the rest will be rejected. The Court was then moved by the appellants to excuse the delay in filing the documents and a statement was filed by their lawyer that the documents were given to him about a week before the first hearing date and could not be filed earlier as they had to be sorted and docketted. In view of its decision that the procedure prescribed for suits was applicable, the Court was also requested to frame the necessary issues and the statement of the lawyer of the appellants regarding the delay in filing the documents was not challenged. The documents were ordered to be received subject to proof, and the following points for determination were settled, namely:

(1) Whether Dharma Rao and his brother were divided.

(2) Whether the sale-deed in Dharma Rao's name was executed nominally.

(3) Whether the attached properties belonged to the petitioners or are they the assets of Dharma Rao.

(4) Whether the will executed by Dharma Rao was acted upon by the petitioners.

[His Lordship dealt with the evidence and proceeded.]

The Subordinate Judge accepted the case of the appellants regarding joint residence but disbelieved it regarding the nature of the sale-deeds. There would according to him be no occasion for the sale-deeds if the indebtedness of Kasi Babu was not true, and the accounts which do not support the respondents are inconclusive though not fabricated. It was not improbable that Kasi Babu did not want to be saddled with heavy debts and might have liked to have some cash instead of a debt amounting to over Rs. 8,000 or Rs. 9,000 with an off-chance of getting some property left after discharging the debts, and Ex. H the power of attorney would have been signed by Kasi Babu if the sale was not genuine. The statement of Mangiah cannot bind Dharma Rao as Ex. H did not authorise the agent to make any statement, and the subsequent treatment of Kasi Babu and his family was probably due to natural love and affection. That no distinction was made in the accounts by Dharma Rao between himself and Kasi Babu, might have been due to his belief that in spite of Ex. B, Kasi Babu was entitled to his share, and Ex. B

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was a real sale supported by consideration. Kasi Babu became divided thereby from Dharma Rao in respect of the properties conveyed thereunder and the properties conveyed became the self-acquired properties of Dharma Rao. It was not possible to say what idea Dharma Rao had in his mind in dealing with the income of the entire estate without making any distinction, and Ex. C the sale-deed was also a genuine transaction though it was taken in the name of Tirupatirayanimgaru. The will was acted upon until it was discovered to be void and the properties attached are assets of Dharma Rao. In the result the Subordinate Judge dismissed the application of the appellants and ordered transmission of the decree to the District Court of West Godavari for execution.

Hence this appeal and the initial question for determination is whether Ex. B the sale-deed which the respondents contend, effected a severance between Dharma Rao and Kasi Babu, is a nominal transaction. There is no reason to suspect the uncontradicted evidence in the case that Kasi Babu was leading a bad life, and the sale-deed came into existence almost immediately after he attained majority.

[His Lordship considered the evidence and concluded.]

The finding of the Subordinate Judge that it is a real transaction cannot therefore be upheld, and on the evidence we find that Ex. B the sale-deed on which the severance between Dharma Rao and Kasi Babu is founded is a nominal conveyance.

The effect of Ex. B the sale-deed, assuming it to be real has then to be considered, and in view of the decision of the Privy Council in *Ramalinga Annavi* v. *Narayana Annavi*[1] in which the previous decisions of the Board were considered, it would be idle to contend that under the Hindu Law it is not open to the members of a joint family to make a division and severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of the joint undivided family. No express agreement is necessary for this purpose and it depends on the circumstances of each case whether a severance of interest in respect of a part of the joint estate creates a disruption of the family status. The intention to remain joint as to the rest of the estate may be inferred from the conduct of the parties, and in the circumstances of this case it was not seriously

1. (1922) 43 M.L.J. 428: L.R. 49 I.A. 168: I.L.R. 45 Mad. 489 (P.C.).

contended before us that the severance if any was total and not partial. It is common ground that Exs. TT-1 to TT-3 left the four branches undivided, and admittedly these branches continued joint until 1908, when by agreement they became separated *inter se* in status and mess. There was no cesser of commensality between members of these branches till then, and Kasi Babu and his family continued with Dharma Rao thereafter. The real question therefore is whether the sale-deed effected a severance between Dharma Rao and Kasi Babu in respect of the properties conveyed, and under the Hindu Law a partition may be effected either by agreement between the coparceners or by an unambiguous declaration of an intention to become divided. The agreement must be between all the coparceners as otherwise it will lead to the inconceivable position, namely, a severance between the parties to the agreement without any disruption between either of them and the other coparceners, and as pointed out in *Kamepalli Ayilamma* v. *Mannem Venkataswamy*[1] to have that effect, the intention to become divided, should be communicated to all the other coparceners. Two or more members of an undivided family be they members of different branches or of one and the same branch of the family have no legal existence as a separate independent unit, so long as the family remains undivided, vide *Sudarsanam Maistri* v. *Narasimhulu Maistry*[2] and it is common ground that the four branches remained undivided until 1908. The sale-deed was in favour of Dharma Rao individually and not as manager of the family, and, treating it as an agreement, it would be an agreement between two members of a branch of the undivided family, which in law cannot effect any severance. Ex. B is a sale *simpliciter* with the usual recitals and clauses and it does not contain any explicit declaration of an intention to become divided. The subsequent conduct of the parties negatives any implied intention to separate, and it was not suggested that the intention if any was communicated to all the other coparceners. There was therefore no severance by communication of an intention to separate, and as laid down in *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*[3], which is still good law, the mere fact that a coparcener makes an alienation does not put an

1. (1917) 33 M.L.J. 746.
2. (1901) 11 M.L.J. 353: I.L.R. 25 Mad. 149 at 155.
3. (1914) 27 M.L.J. 409: I.L.R. 39 Mad. 265.

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end to the coparcenery between himself and the other members of the family. The act of alienation only makes definite the indefinite interest of the alienor (vide *Narayana Sah* v. *Sankar Sah*[1]) and there is no warrant for holding that an alienation of his undivided interest in the entire family estate or a portion thereof, by a coparcener in favour or one or more of the remaining coparceners effects a severance of the alienor from the joint family. The alienation *per se* cannot be held to be an agreement between the members of the family to become divided or expression by the alienor of his intention to separate from and much less a communication thereof to the remaining members of the family, and as pointed out by the Privy Council in *Sivagnana Thevar* v. *Periasami*[2] the alienor acquires rights in the subject-matter of the alienation, notwithstanding the undivided status of the family. The case of an alienation by one coparcener in favour of the only other or all the other coparceners as in *Lakshmi Achi* v. *Narayanasami Naicker*[3] stands on a different footing, as then the alienation would in effect be an agreement between all the coparceners that particular property should thenceforward be the subject of ownership in a particular manner and it is well-settled that by agreement between all the coparceners a severance of interest can be effected between them in respect of the subject-matter of the agreement. An agreement between some of several coparceners cannot bring about that result and on principle the rights of a coparcener alienee who is not the only other coparcener cannot be higher than those of a stranger purchaser. The latter cannot as pointed out in *Suraj Bunsi Koer* v. *Sheo Persad Singh*[4] and *Hardi Narain Sahu* v. *Ruder Perkash Misser*[5] resist the claim of non-alienating coparceners to the whole of the alienated property, and his only remedy is to enforce his right under the purchase by a suit for general partition. That the non-alienating coparcener or coparceners may sue for recovery of the non-alienated share of the alienated property has no bearing on the point and the decree in such suits can only be subject to the result of the suit for general partition which the alienee may institute. The decision in *Iburamsa Rowthan* v.

1. (1929) 57 M.L.J. 685: I.L.R. 53 Mad. 1 at 16 (F.B.).
2. (1878) L.R. 5 I.A. 61: I.L.R. 1 Mad. 312 at 332 (P.C.).
3. (1929) 57 M.L.J. 746: I.L.R. 53 Mad. 188.
4. (1879) L.R. 6 I.A. 88: I.L.R. 5 Cal. 148 (P.C.).
5. (1884) L.R. 11 I.A. 26: I.L.R. 10 Cal. 626 (P.C.).

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Thiruvenkataswami Naick[1] merely extended the right of the sole non-alienating coparcener to his purchaser and as held in *Shyam Sunder Rai* v. *Jagarnath Misra*[2] one of several non-alienating coparceners cannot sue the purchaser for his own share of the alienated property. There is no reason why he should not, if an alienation *per se* effects a severance between the members of the family, and it is impossible to hold that Ex. B created a severance of interest between Dharma Rao and Kasi Babu in respect of the properties conveyed. Dharma Rao would, if the sale is real, be entitled to the interest of Kasi Babu in the properties conveyed but the sale-deed would not effect any severance between them.

It remains then to consider whether if there was a severance, the properties conveyed were blended with the family properties, and as pointed out in connection with the nature of the conveyance, at no time was any distinction made between the income of the four branches from the several sources including the properties conveyed. There was one general account for the four branches till 1908, and no distinction was made by Dharma Rao, even in the swantham accounts opened by him thereafter. The receipts from all sources were dealt with as a single fund, and Kasibabu and his family were treated as members of the joint family. The idea of Dharma Rao in dealing with his receipt as he did is irrelevant and on the materials on record the alleged blending cannot reasonably be doubted. Properties once brought into a common stock cannot be taken out again, vide *Radhakant Lal* v. *Nazma Begum*[3] and as found already the third share was allotted to this branch in 1922, though it was confirmed *eo nomine* in favour of Dharma Rao. The properties would therefore devolve on the appellants and they are not assets of Dharma Rao in their hands.

In the result the appeal is allowed with costs throughout and the claim of the decree-holder to proceed against the properties as assets of Dharma Rao is disallowed.

B. V. V. ——— *Appeal allowed.*

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1. (1910) 20 M.L.J. 743: I. L.R. 34 Mad. 269 (F.B.).
2. (1923) I.L.R. 2 Pat. 925.
3. (1917) 35 M.L.J. 99: I.L.R. 45 Cal. 733 at 744 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE KING.

Dastagir *alias* Gulam Dastagir and others .. *Petitioners** (*Accused Nos. 1 to 4*).

Dastagir, *In re.*

Criminal Procedure Code (V of 1898), S. 162—Copy of witnesses' statement to police—Accused's pleader applying for it—Duty of Court not to refuse.

Where during trial of a case of murder the accused's advocate asked for a copy of the prosecution witnesses' statement to the police under S. 162, Criminal Procedure Code, but the Magistrate refused to grant the prayer, on the question whether under S. 162 of the Code of Criminal Procedure it is the duty of the Court to satisfy itself that a contradiction exists before granting a copy.

Held, that the Magistrate was wrong in refusing to grant a copy, because the section does not require the Court so to satisfy itself and that, subject to anything it may find under the second proviso to the section, the Court must grant the copy, and it is for the accused's counsel to examine it after it is granted, and to discover whatever contradiction may exist.

Jhari Gope v. *Emperor*, (1928) I.L.R. 8 Pat. 279; *Emperor* v. *Nga Lun*, (1935) I.L.R. 13 Rang. 570 (F.B.), followed.

Burn, J.'s judgment in Cr. R. C. No. 44 of 1936, distinguished.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the third Presidency Magistrate of the Court of the Presidency Magistrates of Egmore, Madras, dated the 5th day of July, 1937 and made in C.C. No. 834 of 1937.

V. Rajagopalachari for Petitioners.

E. A. Lobo for *The Crown Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioners in this case are charged with murder and the preliminary enquiry into the alleged offence is in progress before the learned third Presidency Magistrate. P.W. 1 has been examined in chief, and one question has been put to him in cross-examination. At that stage petitioner's pleader applied under S. 162 of the Code of Criminal Procedure for a copy of P.W. 1's statement to the Police. The learned Magistrate refused to grant it. Hence this application in revision. It is a little difficult to understand the precise reason for the refusal. The Magistrate begins by pointing out

* Cr.R.C. No. 385 of 1937.
Cr.R.P. No. 353 of 1937.

16th July, 1937.

that the one answer given by the witness in cross-examination does not establish any contradiction but if he means by that the accused's pleader must either establish an actual instance of contradiction or lay a foundation for the belief that such a contradiction will be found if the police record is referred to, he is asking the accused's pleader to perform an impossible task. (*Emperor* v. *Tahal Saithwar*[1], *Public Prosecutor, Madras* v. *Vedi*[2] and *Babarali Sardar* v. *Emperor*[3].) From what the Magistrates goes on to say, however, it seems to me that he must also have refused to grant the copy because he did not himself on examining the statement perceive in it anything which contradicted the witnesses' evidence in Court, though he does not specifically say this. This raises the question whether under S. 162 of the Code of Criminal Procedure it is the duty of the Court to satisfy itself that a contradiction exists before granting a copy. There are two cases in which this question has been considered which have been brought to my attention. One is that reported in *Jhari Gope* v. *Emperor*[4]. There it is clearly laid down that S. 162 of the Code of Criminal Procedure does not require the Court so to satisfy itself and that subject to the provisions of the second proviso regarding any part of the statement the Court must grant the copy and it is for the accused's counsel to examine it after it is granted and to discover whatever contradiction may exist. The other is a Full Bench ruling of the Rangoon High Court, *Emperor* v. *Nga Lun*[5] which in a brief paragraph confirms the view that whether the Court itself finds any contradiction or not in the statement it must nevertheless grant a copy of it. The Magistrate relied upon an unreported judgment of my learned brother Burn, J., in Criminal Revision Case No. 44 of 1936. It was not necessary in that case to decide this point and though Burn, J., may perhaps have given an indication of this view he has not definitely said that a Court can refuse to grant a copy if it sees no contradiction itself.

Following with respect the Patna and Rangoon decision referred to above I hold that the learned Magistrate was wrong in refusing to grant the copy, and subject to anything which he

1. (1930) I.L.R. 53 All. 94.
2. (1929) M.W.N. 885.
3. (1928) I.L.R. 56 Cal. 840.
4. (1928) I.L.R. 8 Pat. 279.
5. (1935) I.L.R. 13 Rang. 570 (F.B.).

Dastagir, *In re.*

may find under the second proviso direct him to grant it and proceed with the enquiry.

K. C. ——— *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD MACMILLAN, LORD MAUGHAM, SIR SHADI LAL AND SIR GEORGE RANKIN.

Dwarka Nath Singh and others .. *Appellants**

v.

Musammat Raj Rani and others .. *Respondents.*

P.C.

Dwarka Nath Singh *v.* Mt. Raj Rani.

Court of Wards—Will—Draft will forwarded to Board of Revenue—Manager, Court of Wards, communicating final approval—Ward executing and registering will—Subsequent revocation of consent by Court—Permissibility—North Western Provinces and Oudh Court of Wards Act (III of 1899), S. 34.

A person whose estate was under the management of the Court of Wards executed a will and sought the sanction of the Board of Revenue but it was refused. Subsequently the ward presented petitions to the Board requesting them to re-consider their decision. As a result of consideration the Board authorised the Special Manager of the Court of Wards to inform the ward that the Board were prepared to sanction a new will being executed by him provided it fulfilled all the conditions laid down in the Court of Wards Act. Later the ward forwarded a draft of a new will to the Deputy Commissioner of his place and asked for the consent of the Court of Wards to it. Two months thereafter the Board of Revenue wrote to the Commissioner requesting that the attention of ward should be drawn to the fact that the net revenue of the three villages mentioned in the draft will might not be sufficient to cover the amount of certain maintenance legacies charged by the proposed will upon those villages and they also called for a medical certificate as to his medical condition. The certificate was obtained and was satisfactory. Then the ward wrote to the Court stating his willingness to add another village to the villages the income of which was to provide for the allowances. The facts were communicated to the Board of Revenue who came to the conclusion that the Court could not any longer refuse its consent. The Board also wrote to the Commissioner that under the circumstances the Court of Wards will not withhold its consent to a will drawn up by the ward similar to that submitted and altered in the light of later proposals. The Special Manager of the Court of Wards then made a statement that the Board had sanctioned a will provided it was in agreement with the draft will submitted by the ward and he then executed a will and had it registered, thereby purporting to act on the permission granted by the Board. Subsequently correspondence passed between officials of the Court and the ward as to the validity of certain provisions in the will and sometime later when the ward attempted to execute a new will the Court definitely raised the question as to the legality of the prior will. The testator having died the validity of his last will was impugned by his widow.

Held, that the effect of the correspondence between the Court of Wards and the testator was that they had given their consent to the last will, that it

* P. C. Appeal No. 45 of 1935. 7th May, 1937.
Oudh Appeal No. 24 of 1933.

P.C.

Dwarka Nath Singh *v.* Mt. Raj Rani.

was impossible for the Court of Wards, having given its consent and that consent having been acted upon according to its terms, to withdraw its consent at a subsequent date so as to invalidate *ex post facto* the competency of the ward, and that the will executed by the ward with such consent took effect.

Decision of the Chief Court of Oudh reversed.

Appeal from a decision of the Chief Court of Oudh (Wazir Hassan, C. J. and Smith, J.) sitting as a Court of Appeal reversing a decision of a Court of Original Jurisdiction of the same Court (Kisch, J.).

L. De Gruyther, K.C. and *H. R. Abdul Majid* for Appellants.

A. M. Dunne, K.C. and *S. Hyam* for Respondents.

7th May, 1937. Their Lordships' judgment was delivered by

Lord Maugham.

LORD MAUGHAM.—The point for decision in this case is whether a will executed by one Thakur Shankar Bakhsh Singh (whom it will be convenient to call Shankar Bakhsh) bearing date the 28th July, 1904, was a disposition of his property made with the consent of the Court of Wards at Sitapur in the terms of S. 34 of the North Western Provinces and Oudh Court of Wards Act (III of 1899). The appellants propounded the will in question and petitioned the Chief Court of Oudh at Lucknow for letters of administration of the estate of the ward with a copy of the will of the 28th July, 1904, annexed. A number of objections were raised to the alleged will, but they have all failed except on the point as to the lack of consent of the Court of Wards. As to this the Chief Court in its original jurisdiction has held that the consent of the Court of Wards was obtained. The Chief Court in its appellate jurisdiction has held the contrary. The relevant facts are as follows:—

On the 1st August, 1901, the estate of Shankar Bakhsh was taken under the management of the Court of Wards under S. 8 (*d*) (i) of Act III of 1899 above-mentioned. By S. 4 the Board of Revenue is the Court of Wards.

The testamentary capacity of a ward of the Court is governed by S. 34 of the Act which is as follows:—

" A ward shall not be competent

" (*a*) to transfer or create any charge on, or interest in, any part of his property which is under the superintendence of the Court of Wards, or to enter into any contract which may involve him in pecuniary liability:

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"but nothing in this clause shall be deemed to affect the capacity of a ward to enter into a contract of marriage: provided that he shall not incur, in connection therewith, any pecuniary liability, except such as, having regard to the personal law to which he is subject, and to his rank and circumstances, the Court of Wards may, in writing, declare to be reasonable;

"(*b*) to adopt, or to give a written or verbal permission to adopt, without the consent of the Court of Wards;

"(*c*) to dispose of his property by will without the consent of the Court of Wards:

"Provided, first, that the Court of Wards shall not withhold its consent under Cl. (*b*) or Cl. (*c*) if the adoption or testamentary disposition is not contrary to the personal or special law applicable to the ward, and does not appear likely to cause pecuniary embarrassment to the property, or to lower the influence or respectability of the family in public estimation:

"Provided, secondly, that the provisions of Cls. (*b*) and (*c*) shall not apply to any proprietor in regard to whose property a declaration has been made under S. 9."

No declaration under S. 9 was made in respect of the estate of Shankar Bakhsh and therefore the second proviso has no application to this case.

Previously to his becoming a ward Shankar Bakhsh had made a will, which did not require the consent of the Court of Wards. It was dated the 19th of June, 1901, and by it he bequeathed his property absolutely to his wife Musammat Raj Rani. On the 30th of November, 1901, he purported to make another will which was registered on the 3rd December, 1901. By this will he revoked the will dated the 19th June, 1901, and bequeathed his entire property to his wife for life without power of alienation and after her death to Ganga Bakhsh Singh, his cousin, and his sons, the appellants. The will was sent through official channels to the Board of Revenue, which refused to sanction it, and this refusal was communicated to Shankar Bakhsh by the Deputy Commissioner on the 6th August, 1902. Shankar Bakhsh presented two petitions to the Board of Revenue, dated the 7th October, 1902, for permission to adopt a son, and asking for the reason why sanction was refused to his will, dated the 30th November, 1901, and registered on the 3rd December, 1901. He requested the Board to reconsider its decision.

As the result of consideration the Board of Revenue authorised Mr. Dunne, the special manager of the Court of Wards at Sitapur, to inform Shankar Bakhsh that the Board were prepared to sanction a new will being executed by him

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provided it fulfilled all the conditions laid down in the Court of Wards Act. This information was duly conveyed to him by a letter of the 4th July, 1903. He was reminded later of the matter and asked to give an early reply on the 6th August, 1903.

On the 18th January, 1904, Shankar Bakhsh forwarded to Mr. W. R. Partridge, the Deputy Commissioner at Sitapur, a draft of a new will and asked for the consent of the Court of Wards to it.

On the 16th March, 1904, the Board of Revenue wrote to the Commissioner, Lucknow Division, requesting that the attention of Shankar Bakhsh should be drawn to the fact that the net revenue of three villages mentioned in the draft will might not be sufficient to cover the amount of certain maintenance legacies charged by the proposed will upon those villages; and they also called for a medical certificate as to his mental condition.

The certificate was obtained and was satisfactory. On the 27th April, 1904, Shankar Bakhsh wrote to the Court of Wards stating his willingness to add another village to the villages the income of which was to provide for the allowances, and stating also that he desired to strike out of the draft will which he had submitted a certain provision on which nothing now turns.

The facts were communicated to the Board of Revenue who after consideration came to the conclusion that the Court could not any longer refuse its consent. On the 25th May, 1904, the Board wrote to the Commissioner of Lucknow that "in the circumstances now stated the Court of Wards will not withhold its consent to a will drawn up by Thakur Shankar Bakhsh Singh similar to that submitted [that is, the draft will of the 18th January, 1904], but altered in the light of the proposal contained in his letter of the 27th April, 1904" [namely, the proposal to charge a fourth village for the annuities].

A singular circumstance must now be mentioned. This letter was doubtless an authority to the Commissioner to communicate either by letter to Shankar Bakhsh, or verbally to him through Mr. Dunne, the special manager for the Court of Wards in Sitapur, the determination of the Court of Wards

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in the matter. Mr. Dunne was called at the trial on behalf of the defendants, who were objecting to the grant of letters of administration with the will annexed, but he was not asked to state the precise nature of the communication he made to Shankar Bakhsh. That he made a statement on the faith of which Shankar Bakhsh executed a will is however not in doubt. Without submitting any further draft will for the approval of the Court of Wards, on the 28th July, 1904, he executed the will now in question, and had it registered on the 2nd August, 1904, reciting therein that "the Hon'ble members of the Board of Revenue have granted me power to execute the will so I hereby execute this my last will cancelling all the previous wills executed by me".

Nor is the view of Mr. Dunne in any real doubt, for on the 13th December, 1905, he sent the following note to the Deputy Commissioner (Mr. Partridge) at Sitapur:—

"On the 25th May, 1904, the Board sanctioned the execution of a will of Thakur Shankar Bakhsh Singh, draft of which has been submitted with this office letter No. 1344/X-2 6-4, dated 19th February, 1904. I am now informed that a will has been executed and registered but I find there is no copy of it on file. I am not sure that the original might not be on record or kept under lock and key. The Board should also be informed of the will having been executed."

To their Lordships it seems clear that Mr. Dunne had not suggested to Shankar Bakhsh that in order to obtain a definite consent he must submit a fresh draft to the Board. On the contrary the letter is only consistent with the view that he had informed Shankar Bakhsh (with whom he was in frequent communication) that the Board had definitely sanctioned the execution of a will provided it was in accordance with the draft will of the 18th January, altered to the extent mentioned in Shankar Bakhsh's letter of the 27th April, 1904. Their Lordships will consider in a moment whether Mr. Dunne was authorised by the Board to make such a statement to the ward.

It should be added that the wife of Shankar Bakhsh came to know of the consent to the will having been given, and at once wrote to the Board of Revenue in protest. On the 8th June, 1904, the Board of Revenue instructed the Commissioner, Lucknow Division, to "inform the lady through the Deputy Commissioner of the orders conveyed in my No. 691 N/X-214B dated the 25th May, 1904, which are final in this matter." The letter referred to is that above set forth.

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The following correspondence ensued:—

On the 15th December, 1905, Mr. Partridge sent the following note to Mr. Dunne:—

" I did not know that he had executed a will since receipt of the B. O. (Board's Order) dated 25th May, 1904, and have all along been under the impression that he had changed his mind or put off the idea for the present. Please find out from him now whether he has executed a will since that date and if so, call on him to produce it.

" After inspecting it if it has been registered, send me a copy and return the original to him."

On the 19th December, 1905, Mr. Dunne, the special manager, sent the following note to Mr. Partridge, the Deputy Commissioner:—

"I have the original will which Chaudhari Ganga Bakhsh gave me to read two days ago. I send it to you for perusal. It was registered . . . but we were not informed of it. I heard by chance that a will had been executed."

On the 20th December, 1905, the Deputy Commissioner, Mr. Partridge, sent the following note to Mr. Dunne:

" I return the will in original with a copy which I have had made. The copy should be kept in one file and another copy should be made and sent to Commissioner for Board's information."

On the 20th December, 1905, on receipt of the note, Mr. Dunne passed the following order:—

" I have kept the original to return to Chaudhari Ganga Bakhsh. Comply with Deputy Commissioner's orders."

On the 16th January, 1906, Mr. Partridge sent a copy and a translation of the will to the Commissioner, Lucknow Division, and suggested that some provisions in the will were of doubtful validity on the ground of perpetuity. No answer seems to have been received at this time from the Court of Wards; but they seem to have taken advice on the question.

On the 27th March, 1906, Shankar Bakhsh wrote to the Board of Revenue stating that he had quarrelled with his wife and with Ganga Bakhsh (his residuary legatee). He was desirous of marrying again and of making a new will. On the 30th May, 1906, he was informed that the will already executed by him was, to use his own phrase, "somewhat illegal." A number of letters followed. On the 8th June, 1906, he submitted for approval a fresh draft will of quite a different tenor. However, on the 13th July, 1906, the Board of Revenue wrote objecting to the proposed new will on the ground that it tended "to lower the influence or respectability of the family in

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public estimation," and on other grounds, and adding the following statement:—"I am to say that the Court of Wards withholds its consent to the will as at present drafted by the ward as well as to the will already executed by Thakur Shankar Bakhsh Singh." This statement may not unfairly be contrasted with the letter written on the 8th June, 1904, in reference to the protest by the wife of Shankar Bakhsh.

The subsequent events may be shortly stated. On the 21st November, 1906, Shankar Bakhsh wished to make a will in favour of Christian missionaries and presented a draft thereof together with two petitions, but on the 10th January, 1907, the draft was rejected and Shankar Bakhsh was informed of such rejection. He did nothing afterwards, and appears to have regarded his will, dated the 28th July, 1904, as his valid last will and testament.

He died on the 29th of July, 1922, at Sitapur, and the appellants as legatees under the will, dated the 28th July, 1904, or as legal representatives of Chaudhari Ganga Bakhsh Singh (who died intestate on the 19th October, 1929), applied on the 27th October, 1930, to the Chief Court for letters of administration with a copy of the will annexed, of the estate of Shankar Bakhsh, deceased.

On the 5th January, 1931, Musammat Raj Rani, the widow of Shankar Bakhsh, who had entered a caveat on the 23rd December, 1930, and her daughter, Must. Bindeshuri, filed their written objections. They claimed the entire property by virtue of the will dated the 19th June, 1901, and challenged the will dated the 28th July, 1904, on various grounds, as above stated. After an elaborate trial before Kisch, J., the various issues were determined in favour of the appellants, including that as regards consent which alone their Lordships have been dealing with. A decree was passed granting letters of administration to the appellants with the will annexed.

Their Lordships are of opinion that the question in effect to be decided can now be stated in a narrow and precise form. Was Mr. Dunne, the special manager, authorised by the letter of the 25th May, 1904, to convey to Shankar Bakhsh the consent of the Court of Wards to his disposal of his property by will in accordance with the draft will already submitted by him, but altered in the way proposed by his letter of the 27th

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April, 1904? The alternative view is that he was authorised only to convey the information that the Court of Wards would in the future consent to such a disposition, presumably if a further draft were submitted. In answering this question it is desirable to bear in mind certain considerations:—First, S. 34 relates to the *competence* of the ward to dispose of his property. It is a section in derogation of the ward's ordinary rights, and the power of the Court of Wards to withhold their consent is clearly defined in the first proviso. Secondly, the normal course contemplated by the terms of the section is that the consent will be given before the will is executed and may be given either to a draft submitted or in more general terms to a specific disposition of the ward's property. This is not to say that a subsequent consent would not be effective [as is now provided by the United Provinces Court of Wards Act (IV of 1912), S. 37], but that the words of the section point more appropriately to an antecedent consent being given to a disposition not yet effected. It may be observed that a prior consent is clearly intended when the consent is being given to make an adoption under sub-clause (*b*). Thirdly, competence being taken away from the ward to the extent mentioned in the section, it is restored by a consent subject to any qualifications mentioned in the consent. It is therefore impossible for the Court of Wards, having given its consent, and the consent having been acted upon according to its terms, to withdraw its consent at a subsequent date so as to invalidate *ex post facto* the competency of the ward. Fourthly, under the section no formality is requisite to a consent under (*b*) or (*c*), and the consent as regards (*b*) and (*c*) may be either verbal or in writing; [it is otherwise enacted as regards sub-section (*a*)]. Fifthly, it may be pointed out that the section does not prevent the ward from revoking or cancelling a previous will, since such an act is not a disposition of property by him. Their Lordships must express their regret that this was not pointed out to the ward when he became dissatisfied with the will of the 28th July, 1904.

What then was the authority conferred by the letter of the 25th May, 1904? The words relied on by the respondents are "the Court of Wards will not withhold its consent" to a will in certain terms, a sentence which it is suggested contains a verb in the future tense and refers to a future effective consent.

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Their Lordships after carefully weighing the arguments are unable to take this view. The future tense, in the context in which it is found, may naturally be explained by the circumstance that the consent refers to a future event, namely, the execution of a will. The point may be illustrated by supposing that the consent required were a consent under sub-clause (*b*) to adopt a son. If, after examination of all the relevant facts, the Court of Wards wrote to the effect that "in the circumstances they will not withhold their consent to the proposed adoption," it would be difficult to contend that any further consent was necessary; and the position would be at least as clear if the Court of Wards wrote to one of its officers instructing him to inform the ward that "the Court of Wards in the circumstances will not withhold its consent to the proposed adoption."

The view their Lordships have taken is supported by the letters written by Mr. Dunne and Mr. Partridge (the Deputy Commissioner) as well as by the unambiguous letter of the 8th June, 1904, written by the Secretary of the Board of Revenue to the Commissioner, Lucknow Division. Indeed no one concerned in the matter seems to have doubted until July, 1906, that an effective consent to the will had been given, and perhaps not even then, for there is no suggestion that Mr. Dunne or Mr. Partridge had exceeded his authority.

In the result their Lordships must agree with the careful and able judgment of Mr. Justice Kisch, and they are unable to agree with the opinions expressed by the learned Judges of the Chief Court of Oudh on appeal. In particular they think the view that the Court of Wards could withdraw its consent after the will had been executed pursuant to a consent is unsound, nor do they think that what took place in 1906 can properly be taken as qualifying the legal effect of the events prior to the execution of the will in July, 1904. The result may be unfortunate, but that is a circumstance which their Lordships are not entitled to take into consideration in this case.

Their Lordships think it proper to add that the only effect of their decision is that letters of administration with a copy of the will annexed must be granted as prayed, but this will not in any way prejudice any proceedings against any of the beneficiaries which may be open to the respondents or any of them.

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For the reasons above stated their Lordships are of opinion that the appeal should be allowed with costs here and below, and the decree of the trial judge restored. They will humbly advise His Majesty accordingly.

Solicitors for Appellants: *Francis & Harker.*

Solicitors for Respondents: *Barrow, Rogers and Nevill.*

R. C. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE CORNISH.

President of the Board of Commissioners for H. R. E., Madras v. Koteswara Rao.

The President of the Board of Commissioners for the Hindu Religious Endowments, Madras and others .. *Appellants** (*Respondents*)

v.

Thadikonda Koteswara Rao and others .. *Respondents* (*Respondents*).

Grant—Construction—Original grants not forthcoming—Confirmation of grants at inam settlement—Entries in inam register and inam statements—Effect—Grant to deity or to archaka burdened with service—Madras Hindu Religious Endowments Act (II of 1927), S. 70—Archaka as de facto *trustee—Service of notice on him—Sufficiency—Demand by Board—Execution by Civil Court.*

The question that was raised in a number of suits was whether the property in question in each case was held upon trust for the deity or whether the archaka possessed in it any beneficial interest. Excepting in one case the original grant was not produced. The archakas contended that the trusts were created for the limited purpose of "*nithya naivedya deeparathana*", that is to say, that they were intended to be the donees who were to take beneficial interest, subject to particular payments or the performance of particular services. It was not possible to apply the test as to exhausting of the income of the properties for charitable objects as no evidence had been offered on that point. It was shown that "*nithya naivedya deeparathana*" involved a dual liability on the part of the archakas, first as regards the supply of material and secondly as regards the performance of services. It was also shown that there was no separate remuneration by way of wages or salary fixed for the archakas. The inam registers and the inam statements which were forthcoming in most of the cases mentioned the deity as the 'present enjoyer', and while the grant was mentioned to be for "the worship of the idol in the pagoda", the grantee was described as the deity. In respect of the several grants the revenue authority's recommendations were not uniform. In some

* A. A. O. Nos. 25 and 119 to 137 and 295 to 297 and 299 and 455 and 456 and 458 of 1934. 22nd January, 1937.

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cases it was "to be confirmed" and in certain others "to be confirmed and continued so long as the service or worship is regularly performed". In some of the cases extracts from the settlement register were produced and they showed that the lands were entered in the name of the deity.

Held, on a consideration of the evidence, which consisted mainly of the entries in the inam register and the inam statements, that the Court could properly infer that the grants of the properties were to the deity and not to the archakas.

Subramania Odayar v. *Srivaikuntam Kailasanatha Swami Koil*, (1933) 39 L.W. 389: A.I.R. 1934 Mad. 258, distinguished.

When an archaka takes possession of the property belonging to a temple, or a part of it, and conducts himself for all practical purposes as if he were a trustee, his position is that of a trustee *de son tort*, or *de facto* trustee, especially when regarding that property there is no *de jure* trustee. Such a person clearly falls within the definition of trustee given in S. 70 of the Madras Hindu Religious Endowments Act and service of notice on him is good service.

A Court acting under S. 70 (2) of the Madras Hindu Religious Endowments Act must execute the demand made by the Board as if it were a decree and cannot enter into questions of its validity or otherwise.

Hindu Religious Endowments Board, Madras v. *The Shirur Mutt*, (1934) 68 M.L.J. 200: I.L.R. 58 Mad. 760 and *Ramiah* v. *Hindu Religious Endowments Board, Madras*, (1934) 68 M.L.J. 494: I.L.R. 58 Mad. 764, relied on.

Appeals against the orders of the District Court of Guntur dated the 13th day of April, 1933 and made in Execution Petition Nos. 176, 201, 22, 31, 70, 71 of 1930 respectively.

P. V. Rajamannar and *K. Subba Rao* for Appellants.

V. Govindarajachari, *V. Rangachari* and *B. Somayya* for Respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—The principal question that has been argued in this batch of appeals is, whether the property in question in each case is held upon trust for the deity or whether the archakas possess in it any beneficial interest. S. 69 of the Madras Hindu Religious Endowments Act provides for payment of contributions by temples in order that certain expenses may be met. The amount of the contribution depends on the income of the temple and for the purpose of determining what the income is, the question becomes important under S. 70 whether a particular property belongs to the institution or not. The last mentioned section has since been amended, but the provision as it stood before the amendment, governs the present case. The contribution, the section enacted, was to be assessed on and notified to the trustee who

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would be bound to pay the amount within a certain prescribed time, from the funds of the temple concerned. "In default of his doing so", the section went on to enact:

"The Court shall on the application of the President of the Board or Committee recover the amount as if a decree had been passed for the amount by the Court against the religious endowment concerned".

The result of the decisions which have construed Ss. 69 and 70 is, that the assessments made under the sections stand upon the same footing, by some sort of fiction, as decrees of Civil Courts; from that it follows, that petitions filed by the Board to recover the amounts so assessed, partake of the character of execution petitions filed for enforcing such decrees, and are governed by the rules of law applicable to them. In the Guntur District, there seems to be numerous village temples and more than 200 execution petitions have been filed by the Board; in some cases, the question of the deity's title was put in issue even at the initial stage and decided by the Court; in the remaining cases, owing to reasons which it is unnecessary to state, the decision of the question was postponed, but when upon attachment of crops the archakas preferred claims, the question of title came to be considered as upon claim petitions and in each case a finding as to the ownership of the property was given. It may be observed that the bulk of the cases was tried by Mr. Lobo, to whom we are indebted for the large amount of material which he has carefully collected and analysed in his exhaustive judgment. He was succeeded by Mr. Chandrasekhara Aiyar as District Judge, who heard a few of the cases and who, in one of the two judgments he delivered, has fully set out what he regards as the true principles governing this subject.

The question, as already stated, is whether the claim made by the archakas, on the particular facts of each case, is well founded. On their behalf, the argument has been put thus: that the properties were given to their ancestors subject to or burdened with the performance of certain services or in the alternative, that the gifts were annexed to the office of archaka, that is to say, were made to particular individuals for the time being filling that office. On the other hand, for the Board it is contended, that the property in each case was dedicated absolutely to the deity concerned. In other words, each side, taking its stand on the threefold classification adopted in

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Subramanya Odayar v. *Srivaikuntam Kailasanatha Swami Koil*[1] has sought to show either that the property was a gift to the God (that is the Board's contention) or was an archaka service inam, which expression is used as embracing both the categories where the donees take beneficially (that is, the contention of the archakas). In that case it was observed:

"There are three possible views that may be taken of grants of this kind; first, that the land was granted to the institution; secondly, that it was intended to be attached to a particular office; and thirdly, that it was granted to a named individual burdened with service, the person so named, happening to be the office-holder at the time of the grant".

Excepting in one case the original grant has not been produced. The archakas contend that the trusts were created, limited to the purpose of "*nithya naivedya deeparathana*", that is to say, they were intended to be the donees who were to take beneficial interest, subject to particular payments or the performance of particular services. Were the deeds of gift produced, the question would be one of construction, whether the donee in trust is a trustee in respect of the whole property given or only in respect of the part that is given to the deity. In the latter case, the donee has beneficial interest subject to a particular purpose; in the former, the gift is for a particular purpose with no intention that he should take beneficially. (See *Godefroi on Trusts*, 5th Edition, page 122, Chapter X Resulting Trusts and *Tudor on Charities*, 5th Edition, Chapter II, S. 2, headed "creation of a valid charitable trust".) Where specified charitable payments exhaust the income of the property at the date of the gift, it has been held in several cases, that the intention is to devote the whole to charity, but, where they do not so exhaust the income, the charitable trust has been limited to the specific payments and subject to that, the donees have been held to take beneficially. As is observed in Halsbury, where at the date of the gift the property given is more than sufficient to satisfy the purposes specified, the surplus does not go to charity, but either goes beneficially to the donee to whom the property is given in trust for the charitable purposes, or, results to the donor and those claiming under him (*vide* 4 Hals. Chapter on Charities, paragraphs 291 and 292). It of course follows from this, that if the property or the whole of the income arising from it is given

1. (1933) 39 L.W. 389: A.I.R. 1934 Mad. 258.

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to charity, any subsequent increase in the value of the property accrues to the charity. (*Ibid.*) In these cases, as already observed, the instruments of gift are not forthcoming—that renders the decision of the question difficult enough, and it is equally impossible to apply the test of income as no evidence has been offered in that respect. Moreover, even if such evidence, were available, the matter would still present some little difficulty in view of what *"nithya naivedya deeparathana"* imports. It involves a dual liability on the part of the archakas: first, the supply of material and secondly, the performance of services. As Mr. Chandrasekhara Aiyar points out in his judgment:

"Daily offerings in the shape of cooked rice have to be made, cocoanuts and fruits and betel leaves and nuts and flowers have to be offered; camphor has to be waved and incense burnt; and lights have to be lit. All these have to be met from the income from the properties. It is true that the archaka has to maintain himself and the members of his family, and there is no separate remuneration by way of wages or salary fixed for him. But the problem never perhaps troubled the minds of the grantors because the substantial offerings to the deity always come back to the archaka and would be utilised by him for his maintenance. There is no need to make any special arrangement for his support. What was offered to God was practically his. The only items that meant an expenditure without any personal benefit to the archaka were things like camphor, incense and oil."

This accurately describes the effect of the oral evidence adduced to show what the duties of the archakas are. As regards the quantity of the food to be offered, it is impossible to fix it, depending as it does upon the needs of the household of the archaka. Then again, as regards the services of the archakas, the difficulty lies in finding their money equivalent.

The question arises, what then is the evidence bearing on the nature of the grant? No oral evidence has been adduced and that is natural enough, the grants having been made long ago, sometimes during the Moghul period and in many cases, long before the British conquest. The lower Court has had therefore to rely exclusively upon the effect of the inam proceedings in order to find out the nature of the original grant. That enquiry has been described by the Privy Council as a great act of State and the entries then made by responsible officers furnish the most cogent evidence as to the character of the endowment. In these cases, Mr. Lobo has had the unusual advantage of being able to study as many as eighty-eight Fair Inam Register Extracts and this has enabled him to compare

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the terminology adopted by individual officers and to understand the significance of the words used. He has been able to show that different sets of words have been frequently employed to convey the same idea. Where, as in some instances, the inam statements have been produced in addition to the inam registers, greater light is thrown on the question at issue.

Taking by way of example some cases in which both inam statements and extracts from the inam registers are available, what is disclosed may be shortly stated. In C.M.A. No. 299 of 1934 the inam statement signed by the ancestor of the present archaka mentions the deity in column I headed *inter alia* "name of the present enjoyer." Likewise, in column XI the deity is shown under the heading "Particulars of the present enjoyment." There can be no doubt therefore on these admissions, that the gift was to the God. Turning to the corresponding inam register, in column VIII it is mentioned that the grant was "for the worship of the idol in the pagoda." In column XIII the original grantee is shown as the deity; in column XIV the name entered in inam's register is likewise that of the deity. The same remark applies to column XV, which is headed "Name entered in subsequent accounts." In spite of these entries, reliance is placed by the archakas on column XVI where under the heading "The present owner" the following entry appears: "Sri Visveswaraswami (worshipper) Tangalur Venkatasivadu." Here the word "worshipper", as is conceded, means "archaka". What is contended is, that the coupling of the name of the archaka with that of the deity shows that the gift was made to the archaka burdened with service. It is this entry in column XVI which has made such an argument possible, but it is perfectly clear that in the face of the admissions and the entries already referred to, such a contention cannot prevail. There is one matter to which in this connection attention may be drawn. In regard to column VIII it was contended for the archakas that the words "For the worship of the idol" materially differ from the terminology "for *nithya naivedya deeparathana*", the argument being that in the latter case there is a stronger presumption that the grant was intended to be a service inam. That this contention is untenable, is shown beyond doubt by a comparison of the entries in Ex. J, the inam statement and Ex. H-1, the inam fair register in C.M.A. No. 121 of 1934. Both these documents relate to

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the temple of Sri Seetharamaswami at Nandiveligu. In the inam statement signed by the archakas' predecessors-in-interest, the object of the grant is stated to be "for the offering of daily *neivedyam* and *deeparathana*" (*see* column VI). The corresponding entry in the inam register is "for the worship of the idol in the pagoda." Thus, the statement and the register employ two different sets of words to convey the same idea. It may here be observed that, having regard to the scheme of the register, the most decisive entries are those appearing in columns XIII to XVI, for, it is here that provision is made for entering of the name of the grantee, as shown in the relevant ancient records, at different stages, from the date of grant to the date of the preparation of the register—this period covering in some cases more than a century. Again, a distinction has been sought to be made on the basis of the entries in column XXI. The phraseology of the Deputy Collector's recommendation was not uniform. In some cases, it merely ran "to be confirmed"; in certain other cases, the language used was "to be confirmed and continued so long as the service is regularly performed." That no difference was in fact intended, is shown by a comparison of the registers in C.M.A. Nos. 299 and 120 of 1934. The entries in the statement and those in the register in C.M.A. No. 299 of 1934 make it perfectly clear that the grant was made to the deity; the recommendation in column XXI there was "to be confirmed". In C.M.A. No. 120 of 1934 the admissions of the previous archakas and the entries in the register, show likewise indubitably, that the grant was intended to be to the deity, but in column XXI we find that the recommendation, although based on data similar to what existed in the previous case, was differently worded—which fact shows, as already stated, that this difference in the phraseology is immaterial. There is yet another contention that has been advanced, which may be conveniently noticed here. It has been suggested for the archakas that there is another difference in the wording of the recommendation that has an important bearing. The difference lies in this, namely, whether the reference in column XXI is to the service or to the worship. It is argued that if the recommendation is to the effect that the grant is "to be confirmed so long as the service is performed", that is a service grant but if it says "so long as the worship is performed", that is a grant

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to the deity. In the first place, it is significant that the final order in either case is merely "confirmed". Secondly, a comparison of the entries in the three out of the four registers filed in C.M.A. No. 131 of 1934 is sufficient to show that this contention is unfounded. Although there is no material difference in the entries in the other columns, the recommendation in the one case refers to the continuance of the worship, whereas in the other two cases, to the performance of the services.

Lastly there is another piece of evidence in which we may refer. In some cases extracts from the settlement register have been filed and they show that the lands were entered in the name of the God.

Mr. Rangachari, Counsel for some of the archakas, in his argument stressed the distinction between the two classes of grants, namely:

(*i*) those made to specified individuals who at the time happened to be archakas; and

(*ii*) those made to the archakas for the time being, that is, gifts annexed to the archaka office.

His argument is, that although the evidence falls short of showing that the grants here belong to the former category, it must still be held that they fall under the latter group. As between the two contentions, it would probably be easier to make out, were the material forthcoming, that the gifts were intended to be annexed to the office, but in the present cases the only possible conclusion at which we can arrive is, that the gifts were intended for the deity.

For the archakas reliance has been placed upon *Swami Aiyangar* v. *Venkataramana Aiyangar*[1] where the entries in the inam fair register were construed as evidencing a grant burdened with service. But that case is easily distinguishable by reason of the peculiar wording of the entry in column XXI, which ran thus "to be confirmed to the party in column XVI so long as he continues the performance of the services." The reference here is to a party and there can be no ambiguity in the expression "he continues", which must necessarily refer to some individual as distinguished from the deity; and when this entry is read in conjunction with what appears in column XVI

1. (1933) 39 L.W. 513: A.I.R. 1934 Mad. 381.

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where the name of the archaka is given, though preceded by that of the God, it would be legitimate to infer that the grant was in favour of the archaka. As observed in that case, whatever ambiguity might attach to the words in column XVI were explicit and unequivocal.

It has been contended, not without justification, that the effect of our judgment would be to unsettle prevalent notions and to deprive the archakas, as a class, of what has always been assumed without question, to be their private property. But this result, though unfortunate, cannot be helped, and in fact, but for their long and continued enjoyment, the claim made on their behalf would have found little support in the material on the record. The resulting hardship will, we have no doubt, be redressed, partially at any rate, by the Religious Endowments Board fixing proper and adequate remuneration for the archakas' services; this would be some recompense for the loss by the archakas of the lands which, though wrongly, they came to treat as their own.

Then remains a contention which has been put forward, relating to the service of the notices. Under S. 70 of the Hindu Religious Endowments Act, the notice of assessment has to be served upon the trustee of the institution concerned. In most of these cases there was no legal trustee; where a trustee could be found, he was either a nominal or self-constituted trustee. What was more significant—the only property that could be called temple property was in the majority of the cases, property claimed by the archakas as their own, so that if their claim was well-founded, the temple would be left without a cent of land. The question that arises is, whether the requirement of S. 70 is fulfilled by the notice being served upon the archaka on the ground that he is the *de facto* trustee. When the archaka takes possession of the property of the temple or a part of it and conducts himself for all practical purposes as if he were a trustee, we fail to see why his position is not that of a trustee *de son tort* or *de facto* trustee, especially when, as is natural in the case of such village temples, there is no properly constituted or *de jure* trustee. S. 9 (13) runs thus:

" Trustee " means "a person, by whatever designation known, in whom the administration of a religious endowment has vested and includes any person who is liable as if he were a trustee."

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In Halsbury's Laws of England the expression "trustee *de son tort*" is thus defined:

> "A person who, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, makes himself a trustee *de son tort*—a trustee of his own wrong, or, as it is also termed a constructive trustee." [28 Hals. (1914 Edn.), para. 197, p. 91.]

Such a trustee or a *de facto* trustee clearly falls within the definition given in the Act. We therefore agree with the Court below that in every case the service has been sufficient.

In some few cases another point has been raised, namely, that under S. 69 the authority that should make the assessment is the Board itself and where a subordinate officer has been deputed to perform that function, there has been no valid assessment. But it has been found on examination that this question is not material, as there has been in each one of the cases at least one demand, that is, the demand for one fasli which is not open to this attack; it has therefore been agreed that no useful purpose will be served by pressing this point.

The result is, that in the following cases the judgments of the Court below are confirmed and the appeals are dismissed with costs; the advocate's fee in each case is fixed at Rs. 25. C.M.A. Nos. 299 of 1934, 119 of 1934, 120 of 1934, 122 of 1934, 126 of 1934, 127 of 1934, 130 of 1934, 132 of 1934, 134 of 1934, 455 of 1934, 456 of 1934, 121 of 1934, 123 of 1934, 128 of 1934, 129 of 1934, 131 of 1934 and 458 of 1934.

The following two appeals filed by the archakas have not been pressed and are dismissed with costs; the advocates' fee in each case is fixed at Rs. 25 (C. M. A. Nos. 124 of 1934 and 133 of 1934).

As regards C. M. A. No. 125 of 1934 also filed by the archakas, so far as the main part of the case is concerned, their claim fails; but in regard to the 18 acres referred to in the lower Court's judgment, the case stands on a different footing. In the inam register the total extent shown as the diety's land is 20 odd acres, but according to the present contention of the Board, the extent of the land claimed is 47·4 acres and comprises five survey numbers: 422, 547, 563, 569 and 625/3 (*see* Ex. G, the preliminary report). According to the re-settlement register, only three of these plots, namely, those bearing 422, 547 and 563 are shown as belonging to the institution and these three together are of the total extent of

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nearly 32 acres, that is to say, more than what is shown in the inam register. It follows that the claim of the archakas that they are entitled to the plots bearing the remaining two numbers, namely, 569 and 625/3, of the total extent of 18 odd acres cannot be dismissed as being unfounded. The omission of these numbers in the re-settlement register supports their contention that the diety is not entitled to them. Although the archakas have not been able to make out how they acquired these lands, we must on the evidence hold that their claim has been established. To this extent the lower Court's finding is varied; otherwise the appeal stands dismissed. In this case we direct that each party shall bear his costs throughout.

C. M. A. No. 25 of 1934 (E. P. No. 176 of 1930).

So much for the appeals filed by the archakas. Turning now to the appeals filed by the Board, C. M. A. No. 25 of 1934, with which we shall first deal, raises no question of title. The respondent admits that his possession is that of a trustee but contends that the temple in question is a private and not a public one. The learned District Judge has upheld his contention on the ground of *res judicata* but as has been held in several cases, a Court under S. 70 (2) of the Act must execute the demand made by the Board as if it were a decree and cannot enter into questions of its validity or propriety. (See *Hindu Religious Endowments Board, Madras* v. *The Shirur Mutt*[1] and *Ramiah* v. *Hindu Religious Endowments Board, Madras*[2].) We must therefore set aside the order of the Court below, but this decision will not preclude (we make this observation with the consent of both sides) the question whether the temple is private or public, from being raised under S. 84 of the Act and being dealt with under its provisions. In the circumstances we direct each party to bear his costs throughout.

C. M. A. No. 135 of 1934 (E. P. No. 204 of 1930).

The question here, as in most of the cases dealt with already, is whether the grant was to the deity or was made to the archakas burdened with service. The trustee of the institution appears by Counsel and supports the claim put forward on behalf of the Board. The lower Court has upheld the

1. (1934) 68 M.L.J. 200: I.L.R. 58 Mad. 760.
2. (1934) 68 M.L.J. 494: I.L.R. 58 Mad. 764.

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archakas' claim, but in doing so, has refused to consider two decisive documents. The inam fair register completely supports the Board's contention, that the diety is the owner and indeed, there was only one course open to Mr. Lobo on the principles he has himself adopted in the cases already dealt with by us, namely, to have allowed the Board's claim. The entries in the register (Ex. CC-7) are unambiguous and fully make out the deity's title. The entry in column VIII is "for the support of the pagoda and the deity's name is given both under the column headed "the name of the original grantee" (column XIII) and under the columns relating to "the present owner" (columns XVI to XX). As already remarked, the learned District Judge would have had no option on these entries but to give a finding in favour of the Board; but unfortunately, though this exhibit was filed and was used by the Judge himself for another purpose, he refused to consider it in this connection, apparently on the ground that it was not definitely relied on by the Board for proving title. Further, the resettlement register, on which also Mr. Lobo acted in the other cases, fully supports the Board's contention. This was filed in the lower Court, but was not for some reason marked. An affidavit has been filed here explaining the circumstances in which the lower Court failed to consider the two documents mentioned above. There is no reason why these two public documents should be excluded in this particular case and we have therefore decided to act upon them. For the archakas, reliance has been placed upon Exs. II and I, which show at best no more than that their ancestors treated the property as their own. But, even then, it must be remarked that the recitals in Ex. II, far from supporting the archakas' claim, seem to evidence a recognition on their ancestors' part that the property belonged to the temple. So far as Ex. I is concerned, it does not deal with the suit property, though there are some remote recitals relating to it. There can be no doubt on the evidence that the claim of the deity has been made out. The appeal is allowed with costs throughout, to be paid by respondents other than the first respondent. The advocates' fee is fixed at Rs. 25.

C. M. A. No. 297 of 1934 (E. P. No. 245 of 1931).

In this case, the lower Court's finding is clearly wrong. The entries in the inam register show beyond doubt that

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the grant was made to the deity. The name of the original grantee in column 13 (as in many other cases) does not appear, and the entry reads "Not known." Column 14 shows that in Fasli 1207 (1807 A.D.) the deity's name was entered in the relevant records: in column 15 the deity is likewise shown as the owner in the accounts of Fasli 1240 (1830): in columns 16 to 20 " the present owner " is shown as the deity again. The lower Court's finding that the grant was an archaka service inam, cannot in the face of these entries be upheld. The cases were tried by Mr. Chandrasekhara Aiyar in two batches. The principles he adopted in deciding the second batch are, as we have shown, correct. This case however belongs to the first batch and had he applied those principles, his conclusion would have been quite the opposite. The truth is, that by the time he came to deal with the second batch, he had become quite familiar with the terminology employed and the principles applied at the inam enquiry. Our conclusion receives further support from the inam statement filed here by consent. The entries in that statement amount to admissions by which the archakas are bound. Further, there are these circumstances, namely, that the archakas alone have been functioning as trustees and that, should it be held that the land belongs to the archakas, the temple would own no property whatever.

In the result, the lower Court's decision is set aside and the appeal by the Board is allowed with costs; the Advocates' fee is fixed at Rs. 25.

C.M.A. No. 136 of 1934 (E.P. No. 48 of 1930).

This case differs from the rest, as the deed of gift is here forthcoming; also in another respect, namely, that the gift is of a recent date. The donee under the deed is Narayanacharlu, archaka of Sri Kothandaramaswami. As observed in *Swami Aiyangar* v. *Venkataramana Aiyangar*[1] the question whether the grant is to an institution represented by its manager or to a named individual who fills a certain character, is often a difficult one. Three constructions are possible: *first*, that the religious trust was intended to attach to the whole property, in which case the archakas hold it in trust for the deity; *secondly*, that it was intended to attach to a part of it; in other words, that the gift was to the archakas burdened with service; that

1. (1933) 39 L.W. 513: A.I.R. 1934 Mad. 381.

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the gift was intended to be annexed to the archaka office (see *Subramania Odayar* v. *Srivaikuntam Kailasanatha Swami Koil*[1]). The question is one of construction, depending in each case upon the terms of the particular instrument. The gift was made, as the deed recites, on the occasion of the installation of the deity. This supports to some extent the Board's contention but, apart from that, the decisive words in our opinion in the deed, are those, which direct the archaka to take possession *on behalf of* the institution. The expression 'on behalf of' clearly indicates that the donor intended that the deity was to be the grantee. It is contended that the recital that the donee was to be in possession 'hereditarily', is inconsistent with the idea that the land was to be taken by the deity. This expression shows no more than the gift was intended to be absolute; it was with the same object that the other recital was made, namely, that the donee was to enjoy the land in any manner he pleased. Lastly remains the fact, though this by itself may not amount to much, that the property was described in the deed as being worth only Rs. 600, which would go to show that the income would be just sufficient for the purposes specified in the deed, namely, *nithya naivedya deeparathana.*

In the result, the lower Court's decision is reversed and the appeal filed by the Board is allowed with costs; the Advocates' fee is fixed at Rs. 25.

C.M.A. No. 137 of 1934 (E.P. No. 118 of 1930)
and
C.M.A. No. 295 of 1934 (E.P. No. 82 of 1931).

In these cases the decisions of the lower Court have not been shown to be wrong and they are accordingly confirmed and each of the appeals is dismissed with costs; the advocates' fee in each case is fixed at Rs. 25.

C. M. A. No. 296 of 1934 (E. P. No. 128 of 1931).

Mr. Subba Rao, the Board's Counsel, reports that the appeal has abated and it is dismissed.

B. V. V. —— *Orders made in favour of the Board.*

1. (1933) 39 L.W. 389.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

S. P. P. L. Palaniappa Chettiar, through his authorised agent Ramanathan Chettiar .. *Petitioner** (*Respondent*)

v.

The Official Receiver of Madura .. *Respondent* (*Petitioner*).

Palaniappa Chettiar *v.* Official Receiver of Madura.

Provincial Insolvency Act (*V of 1920*), *S. 54—Hypothecation of family property by father representing his minor sons—Whether alienation a fraudulent preference.*

In a case in which the father, that is, the insolvent, was himself entitled in law to convey the entire interest in the family property and his execution of a hypothecation bond purported to convey the entire interest also, in the circumstances, the mere joining of his minor sons represented by himself as their guardian does not in any way diminish the legal effect of the transaction which is that of a valid alienation of the entire joint family property by the father. So long as the transfer of property *ex facie* binds the whole property such transfer can be annulled under S. 54 of the Provincial Insolvency Act when the conditions are satisfied, even though it may be a joint family property in which the minor sons have an interest.

Gharib-ullah v. *Khalak Singh*, (1903) L.R. 30 I.A. 165: I.L.R. 25 All. 407 (P.C.), relied on.

Subramanian Chettiar v. *Subbaraya Goundan*, A.I.R. 1935 Mad. 246, dissented from.

Petition under S. 75 of Act V of 1920, praying the High Court to revise the order of the District Court of Madura dated 25th March, 1935, and made in C. M. A. No. 70 of 1933 presented against the order of the Court of the Subordinate Judge of Dindigal dated 16th August, 1933, and made in C.M. P. No. 491 of 1933 in I. P. No. 48 of 1931.

M. Patanjali Sastri and *T. K. Sundararaman* for Petitioner.

K. S. Desikan and *S. V. Venugopalachari* for Respondent.

The Court delivered the following

JUDGMENT.—This petition arises out of an application by the Official Receiver of Madura under S. 54 of the Provincial Insolvency Act to declare as void a certain hypothecation bond dated 21st July, 1931, in favour of the respondent and to annul the same.

The bond was executed by the insolvent in I. P. No. 48 of 1931 and also on behalf of his minor sons. On the merits it was found by both the Courts below that the alienation was a fraudulent preference and it was accordingly annulled. In

* C. R. P. No. 838 of 1935. 30th April, 1937.

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this petition no attempt has been made to question the correctness of the concurrent findings to this effect by the two Courts below, and the only point urged is that the transfer can be set aside or annulled only as regards the insolvent's own share in the family properties which were mortgaged and that it cannot be set aside or annulled in respect of the minors' shares in the properties, because it is only the transfer of the insolvent's property that can be set aside under S. 54 of the Act. Reliance is placed in support of this contention on the decision of Sundaram Chettiar, J., reported in *Subramanian Chettiar* v. *Subbaraya Goundan*[1]. No other decision on the point has been brought to notice, and Sundaram Chettiar, J., in his judgment mentions that the point is a new one. I have given my best consideration to this question and I find myself unable to agree with the view expressed by Sundaram Chettiar, J. The main point to remember is that what was mortgaged was the family property and not the separate shares of the executants, namely, the father and the sons. The mere fact that the sons also were joined in the document with the father representing them does not show that it was intended to mortgage the sons' shares separately from the father's share. What was done was that the entire family property was mortgaged, the executants being not merely the father but also his minor sons represented by him. The minor sons cannot be said to have had any separate share in the family property which they could hypothecate under the bond. In a somewhat similar case, the only difference being that instead of the father the eldest brother and managing member of the family took part along with his brothers, namely, the case reported in *Gharib-ullah* v. *Khalak Singh*[2] which went up to the Privy Council it was held that though in that case one of the three executants of the deed was a minor represented by his mother and the alienation was open to objection on the ground that the mother could not validly act as guardian of the minor's property the alienation was upheld by their Lordships on the Judicial Committee on the ground that the eldest brother's execution of the document was sufficient to convey the entire interest in the family property once it was proved that the alienation was for valid family necessity. In the present case there can be no doubt

1. A.I.R. 1935 Mad. 246.
2. (1903) L.R. 30 I.A. 165: I.L.R. 25 All. 407 (P.C.).

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that the father had authority to mortgage the entire family property because the debt for which the mortgage was executed was an antecedent debt of his not tainted by illegality or immorality. In other words, this is a case in which the father, that is, the insolvent, was himself entitled in law to convey the entire interest in the family property and his execution of the bond purports to convey the entire interest also. In these circumstances the mere joining of his minor sons represented by himself as their guardian does not in any way diminish the legal effect of the transaction which is that of a valid alienation of the entire joint family property by the father. S. 54 of the Provincial Insolvency Act is to the effect that a transfer of property made by the insolvent may in certain circumstances be annulled by the Court. The present transfer is a transfer of property made by the insolvent and the other conditions are satisfied. The section does not say that it is only a transfer of the insolvent's own or separate property that can be annulled by the Court. So long as the transfer of property *ex facie* binds the whole property such transfer can be annulled under S. 54 when the conditions are satisfied even though it may be joint family property in which the minor sons had an interest. I am therefore of opinion that the decree appealed from is right and that there is no need to interfere in revision.

The petition is accordingly dismissed with costs.

K. C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Chudvvalathur Devaswom Uralara M. Narayanan Nambudri and others .. *Petitioners* in both (Petitioners)*

v.

The Sub-Collector and Land Acquisition Officer, Malappuram .. *Respondents (Respondents in both).*

Narayanan Nambudri *v.* Sub-Collector and Land Acquisition Officer, Malappuram.

Land Acquisition Act (I of 1894), Ss. 31 (2) and 32—Application for purchase of immovable properties with moneys in deposit in Court—Report of Collector regarding the insufficiency of the properties for the amount—

* C. R. P. Nos. 1587 and 1588 of 1935. 23rd April, 1937.

Narayanan Nambudri *v.* Sub-Collector and Land Acquisition Officer, Malappuram.

Report whether final—The Court in dealing with such matter, performing a judicial function—Procedure to be followed.

The trustees of a Malabar temple desired to purchase immovable properties with the money in Court deposit under land acquisition proceedings previously by the Government and on the application under S. 32 of the Land Acquisition Act the Court appointed a Commissioner to examine the properties and gave a favourable reply, but subsequently the Court, calling for a report from the Collector who stated that the properties were insufficient for the amount, refused to make an order for the purchase and dismissed the application; thereupon the trustees filed a petition in the lower Court to have the said order reviewed and requested the Court to give them an opportunity of adducing fresh evidence for showing that the properties were sufficient and to order payment. The Court below felt that inasmuch as the Collector stated that the properties were insufficient for the amount, there was no provision of law for enabling the Court to proceed further in the matter.

Held, (1) the view taken by the lower Court that the Collector's opinion regarding the purchase is the final word upon the matter was unsound.

The Court is invested with certain powers under S. 32 in regard to monies deposited in Court under sub-S. (2) of S. 31 of the Act. One of such duties is that the Court shall order the money to be invested in the purchase of other lands to be held under the like title and condition of ownership as the land in respect of which such money shall have been deposited was held. It will be seen that this duty is laid on the Court; it is a judicial function which has to be performed by it. A judicial act must therefore be done in accordance with the procedure usually attributed to it, that is, after hearing the parties, taking such evidence as is necessary and appropriate for the particular act. The Court therefore must be satisfied as to the propriety of the purpose, the value and the title and it is only after it is satisfied in regard to these particulars, it can make an order for investment. If the Court thinks fit that any evidence is necessary by way of supplementing what has been already adduced before the Collector or that an expert's testimony is necessary, it is open to the Court to give such directions in regard thereto, and have such evidence taken. It is open to the Court to disregard the report of the Collector and arrive at an independant valuation after a consideration of the report, and direct the purchase accordingly.

The proper procedure for the petitioners would have been for the petitioners to have the order dismissing the application corrected in the High Court. Hence the present petitions fail.

Petitions under S. 115 of Act V of 1908, praying the High Court to revise the orders of the Court of the Subordinate Judge of Ottapalam dated 29th August, 1935 and made in I. A. Nos. 698 and 699 of 1935 in L. A. Nos. 4 and 10 of 1932 respectively.

P. Govinda Menon for Petitioners.

The Government Pleader (*K. S. Krishnaswamy Aiyangar*) for Respondents.

The Court delivered the following

JUDGMENT.—These two revision petitions arise out of an order passed by the Subordinate Judge of Ottapalam declining

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to order payment of two sums of money being the compensation money in respect of certain lands belonging to Chudvvalathur Devaswom acquired by the Government and lodged into Court under the provisions of the Land Acquisition Act. The petitioners, who are the trustees, desired to purchase certain immovable properties on the ground that the present investment of the said money in the Government securities did not yield sufficient income. On application made by the trustees under S. 32 of the Land Acquisition Act, the Subordinate Judge of Ottapalam appointed a Commissioner to examine the properties and seems to have given a favourable report in regard to the purchase. Subsequently, the Court called for a report from the Collector and the Collector seems to have stated that the properties were insufficient for the amount. Thereupon the Court refused to make an order for the purchase, and the petition was dismissed. The trustees then filed petitions out of which these revision petitions arise to have the said order reviewed and requested the Court to give the petitioners an opportunity of adducing fresh evidence for showing that the properties are sufficient and to order payment of the moneys. The learned Subordinate Judge took the view that in as much as the Collector stated that the properties were insufficient for the amount there is no provision of law for enabling the Court to proceed further in the matter and therefore he declined to review the order already passed.

It seems to me that the view taken by the learned Subordinate Judge that the Collector's opinion regarding the purchase is the final word on the matter is unsound and cannot be sustained. In regard to the monies deposited in Court under sub-S. 2 of S. 31 of the Land Acquisition Act the Court is invested with certain powers under S. 32. One of such is that the Court shall order the money to be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held; and even in the case of moneys that have been invested in Government or other approved securities the Court is also given power to have them re-invested in the purchase of other lands. It will be seen that this duty is laid on the Court; it is a judicial function which has to be performed by it. A judicial act must therefore be done in accordance with the procedure usually attributed to it,

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that is, after hearing the parties, taking such evidence as is necessary and appropriate for the particular act. The Court therefore must be satisfied as to the propriety of the purpose, the value and the title and it is only after it is satisfied in regard to these particulars, it can make an order for investment. Reliance was placed by the lower Court on a rule framed under the Act and published in Civil Rules of Practice, that the purchase of lands under S. 32 should be effected through the Collector of the District. This only means that the actual purchase must be made through the Collector, that is, if the Court is satisfied as to the propriety of the purchase, it can direct the Collector to make an investigation into its value, into its title and all other particulars that may be necessary to enable the Court to make a final order directing the investment of the money in the purchase of specific lands which it has proposed to purchase. It seems to me that in referring the matter to the Collector the Court should ordinarily direct the Collector to revise all the evidence and any information which the parties may place before him and consider the same along with the information which he would independently obtain and submit a report to the Court. On receipt of the said report the Court should hear the parties and pass such appropriate order as it thinks necessary. If the Court thinks that any evidence is necessary by way of supplementing what has been already adduced before the Collector or that an expert's testimony is necessary, it is open to the Court to give such directions in regard thereto and have such evidence taken. It is open to the Court to disregard the report of the Collector and arrive at an independant valuation after the consideration of the report and direct the purchase accordingly. If it directs purchase, it can give appropriate directions to the parties to place the draft conveyance before the Court and after approval of the same, send it to the Collector for completion of the transaction, that is, for engrossment on stamp paper, for registration and for payment of the money and the Court can issue a cheque in favour of the Collector the necessary payment. This section (S. 32) it may be noticed, was modelled in S. 69 of the Land Clauses Act of 1845. The English practice appears to have been to a similar effect. In In re *Caddick's Settlement*[1] an application was made for the re-investment of moneys in

1. (1852) 9 Hare, App. I, ix: 68 E.R. 759.

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land under the said section. Vice-Chancellor Turner required first to be satisfied by affidavit that the purchase proposed to be made was a fit and proper investment of the fund; and having been satisfied by the evidence on that point directed a note to be taken by the registrar that the Court approved of the proposed purchase and adjourned the petition until the opinion of the conveyancing counsel as to the title was produced. After the title was approved by the conveyancing counsel the Court insisted upon the approval of the title being verified by affidavit being filed and the application was adjourned to enable the counsel to settle the draft conveyance and place it before the Court. After the approval of the conveyance the Vice-Chancellor made the order that upon the completion of the engrossment and upon due execution of the conveyance by all proper parties to be verified by affidavit the sum should be paid out of Court to the vendor (vide In the matter of *Caddick's Settlement*[1].) In In re *Martin*[2] on a similar application by the trustees of a Hospital the Master of the Rolls passed the following order:—

"The only order that I can now make is, that I approve of the purchase and the value, and also the propriety of the investment, but before I can make any other order, the petitioner must obtain the certificate of one of the conveyancing counsel of the Court approving of the title, and an affidavit verifying the title, in the meantime the petition must stand over".

It will thus be seen that, it is the Court that finally comes to the conclusion as to the propriety of the purchase, the value and the title, though in order to save the time of the Court, it either gets the necessary information by means of affidavit or by reference to conveyancing counsel in regard to the title and by reference to experts in regard to the value. Anyhow, the order ultimately passed is a judicial order made by the Court. The system of conveyancing counsel does not exist in India and it is not possible to follow the English practice literally. That is why the machinery of the Collector has been provided for, but the Collector is not the final authority on the matter. In *Nawab Bahadur of Murshidabad* v. *Deenendra Mallik*[3] an application was made under S. 32 of the Land Acquisition Act. The President of the Calcutta Improvement Tribunal directed that compensation money should be invested in the purchase of a property. He referred the matter to the Collector who valued the property at Rs. 9,72,000. On the receipt of the

1. (1853) 9 Hare, App. II, lxxxv: 68 E.R. 806.
2. (1853) 22 L.J. Ch. 248.
3. (1932) I.L.R. 59 Cal. 1272.

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report from the Collector the President obtained an independent valuation by an outside expert without giving the parties concerned an opportunity to examine the report or cross-examine the expert and directed the purchase of the land for a sum of Rs. 9,83,000 which was Rs. 11,000 higher than the Collector's figure. Pearson, J., was of the opinion that this procedure was irregular and observed thus:

"The President in these proceedings was a judge and was bound to exercise his functions in a judicial manner, whereas in adopting this procedure, he has clearly acted illegally".

A similar view was taken in another case reported in *Sarala Dassee* v. *President, Calcutta Improvement Tribunal*[1]. In that case the President of the Calcutta Improvement Tribunal ordered certain monies which remained in the Government securities to be reinvested in the purchase of land. An objection was taken that it was not desirable to make a re-investment. The learned Judges observed:

"The President while exercising his judicial function, should, therefore, consider whether the re-investment is expedient in view of the allegations of the petitioner for whose benefit the investment has been made"

and held before the President desires whether the money should be re-invested, he must hear the parties. It therefore seems to me that the view taken by the lower Court in regard to the powers of the Court is unsound.

The question is whether these revision petitions are maintainable. As contended by Mr. Champakesa Aiyangar the proper procedure which the petitioners should have adopted was to have the order dismissing the petition corrected by this Court. On this ground the revision petitions fail but as no question of *res judicata* arises and as the learned Subordinate Judge has not gone into the propriety of the purchase and other matters relating thereto, it is open to the petitioners even now to make an independent application pointing out the desirability of making the purchase of the said property and the Court will be at liberty to consider the propriety of its purchase and then make a reference to the Collector in the light of the remarks contained in this judgment.

In the result, the Civil Revision Petitions are dismissed but I allow costs to the Government in one petition, namely, in C. R. P. No. 1587 of 1935.

K. C. —— *Petitions dismissed.*

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1. (1934) I.L.R. 62 Cal. 154.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Kotha Achayya Setti .. *Petitioner* (Accused).*

Kotha Achayya Setti, In re.

Madras District Police Act (XXIV of 1859), S. 47—Offence under—Principle under S. 211 of Indian Penal Code—Whether could be applied—Differences between the two sections

Where a petitioner sent a petition to the District Superintendent of Police of a place alleging that a Sub-Inspector under him had obtained certain jewels from him sometime back and had refused to return them when asked, and therefore asked the District Superintendent of Police to issue orders to his subordinate to return the jewels, but the case of the prosecution was that the above petition contained false allegations since the jewels had been returned previously to the petitioner and both the trial and the appellate Court below found that the statements were false and that the petitioner was guilty under S. 47, Madras District Police Act, though it was argued in criminal session that all that the petitioner had desired was to bring some kind of departmental punishment upon the Sub-Inspector and he had no intention of compelling him to stand his trial for any criminal offence and tried to apply to this case the same principle as under S. 211, Indian Penal Code, namely, that before a man could be found guilty of having made a false charge against another person under S. 211, it must be established that his intention in bringing the false information was that criminal proceedings should be instituted.

Held, the principle underlying S. 211, Indian Penal Code, would not apply to a case under S. 47, Madras District Police Act. Except that the word 'charge' appears both in S. 47 and S. 211, there is no similarity.

S. 211 provides for two offences both of which are equally punishable. One is the actual institution of criminal proceedings with a certain intent and the other is a false charge against a person of having committed an offence knowing that there is no just or lawful ground for such a charge. It is clear therefore that the charge referred to in S. 211 must be a charge of the same nature as the complaint and the actual institution of criminal procedure dealt with by the first clause in that section. And further, the reference to the specific allegation that the person charged had committed an offence is an indication that the charge must be with the intention of bringing him to trial in a criminal proceeding. In S. 47 there is no reference to any criminal proceeding or any Court. There are other minor differences also between the two sections.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Gooty, dated 16th October, 1936, in Criminal Appeal No. 23 of 1936 preferred against the judgment in C. C. No. 162 of 1936 on the file of the Court of the Stationary Sub-Magistrate, Gooty.

K. S. Krishnaswami Aiyangar and *K. S. Jayarama Aiyar* for Petitioner.

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* Cr. R. C. No. 87 of 1937.
(Cr. R. P. No. 82 of 1937).

23rd July, 1937.

Kotha Achayya Setti, *In re.*

The Public Prosecutor on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The petitioner in this case sent a petition to the District Superintendent of Police, Anantapur, in January, 1936, alleging that the Sub-Inspector of Police, Gooty, had obtained certain jewels from him in the preceding June, and had refused to return them when requested to do so. He accordingly asked that the District Superintendent of Police should give orders that the jewels should be soon returned to him. It is the case for the prosecution that this petition contained allegations which were false and that the jewels had been returned before the petition was sent and the petitioner was convicted under S. 47 of the Madras District Police Act. He of course denied at the trial that the statements in his petition were false but it was found both by the trial Court and by the appellate Court that those statements were false and this finding of fact cannot now be further challenged.

It is however argued before me that S. 47 does not apply to the petitioner's action. All that the petitioner wanted to do, it is urged, was to bring some kind of departmental punishment upon the Sub-Inspector and he had no intention of compelling him to stand his trial for any criminal offence. Rulings have been cited before me both of this Court and of the Calcutta High Court (*Rayan Kutti* v. *Emperor*[1] and *Abdul Hakim Khan Chaudhuri* v. *Emperor*[2]) which deal with the interpretation of S. 211, Indian Penal Code and which hold that before a man can be found guilty of having made a false charge against another person under S. 211, it must be established that his intention in bringing the false information was that criminal proceedings should be instituted. It is argued before me that the same principle ought to be applied to S. 47 of the District Police Act. I am unable to accept this argument. It is no doubt asserted that the language of S. 47 and the language of S. 211 are similar. But except that the word 'charge' appears both in S. 47 and in S. 211 there is no similarity at all. S. 211 provides for two offences both of which are equally punishable. One is the actual institution of criminal proceedings with a certain intent and the other is a false charge against a person of having committed an offence knowing that there is no just or lawful ground for such a charge. It is clear there-

1. (1903) I.L.R. 26 Mad. 640. 2. (1931) I.L.R. 59 Cal. 334.

fore that the charge referred to in S. 211 must be a charge of the same nature as the complaint and the actual institution of criminal proceedings dealt with by the first clause in that section. And further, the reference to the specific allegation that the person charged had committed an offence is an indication that the charge must be with the intention of bringing him to trial in a criminal proceeding. In S. 47 there is no reference to any criminal proceeding or any Court. The language simply is "shall maliciously and without probable cause prefer any false or frivolous charge against any Police Officer".

There are minor differences also which may be incidentally referred to, namely, the very much greater severity with which an offence under S. 211 is punished, the maximum being two years in that case and only three months in S. 47, and the fact that in S. 47 the institution of a false or frivolous charge is coupled not with any offence connected with legal proceedings but with the assaulting or resisting a Police Officer in the execution of his duty.

I am quite unable therefore to hold that there is any such identity of meaning between these two sections with regard to the word 'charge' as would justify me in applying the rulings cited before me to a case under S. 47 of the Madras District Police Act. I therefore hold that the conviction in this case is vitiated by no error of law and must be upheld. The Revision Petition is accordingly dismissed.

K. C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE STODART.

Anjaneya Sastri .. *Appellant* (3rd Defendant)*

v.

Kothandapani Chettiar and others .. *Respondents (2nd and 3rd Plaintiffs and 2nd Defendant).*

Anjaneya Sastri *v.* Kothandapani Chettiar.

Civil Procedure Code (V of 1908), S. 92—Suit under—Parties—Alienees from trustees of trust property—Alienees denying trust and its title to properties in their possession—If proper or necessary parties.

It is no doubt true that in a suit under S. 92, Civil Procedure Code, no relief can be granted as against third parties. But it does not necessarily

* Appeal No. 501 of 1931. 20th September, 1935.

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follow from this that the Court is not competent to bring before the forum any such person. Alienees from trustees of trust property and in possession of such property who deny the existence of the trust and the title of the trust to the property in their possession, though not necessary parties, are certainly proper parties to the suit, though no remedy or relief can be granted as against them; because in their absence the Court cannot effectually and completely adjudicate the question of the existence of the trust and of its title to the property in question.

Lachman Prasad v. *Munia,* (1925) I.L.R. 47 All. 867 at 871, followed.

Johnson Po Min v. *U Ogh,* (1932) I.L.R. 10 Rang. 342, not approved.

Venkatanarasimha Rao v. *Subba Rao,* (1922) I.L.R. 46 Mad. 300 and *Evalappa Mudaliar* v. *Balakrishnammal,* (1927) 53 M.L.J. 183, relied on.

English and Indian cases discussed and reviewed.

Appeal against the decree of the Court of Small Causes at Kumbakonam in O. S. No. 2 of 1930 (O. S. No. 72 of 1928, Sub-Court, Kumbakonam).

K. S. Krishnaswami Aiyangar and *K. Sankara Sastri* for Appellant.

K. Narasimha Aiyangar for Respondents.

The Court delivered the following

Varadachariar, J.

JUDGMENTS. *Varadachariar, J.*—This appeal arises out of a suit under S. 92, Civil Procedure Code. The subject-matter of the trust is a choultry of which the first defendant became the trustee and manager (sometime between 1893 and 1897) under the provisions of (Ex. D-1) an agreement between himself and his adoptive mother the first plaintiff, dated 22nd June, 1888. Since 1903, the first defendant would appear to have been ignoring the trust and treating the property as his own. One of his sons purported to alienate his share in the property to one Narayanasami Chettiar under whom the second defendant claims. The third defendant has become the purchaser of the suit property in execution of a decree obtained against the first defendant in Small Cause Suit No. 2496 of 1927 on the file of the Kumbakonam Small Causes Court. The result has been that for many years past the suit property is not being used for the purpose of the trust at all and the first defendant has been clearly guilty of breach of trust. This suit was accordingly filed for the removal of the first defendant from the office of trustee, for the appointment of a new trustee and for the settlement of a scheme for management.

In view of the principal contentions pressed in the appeal, it is necessary to refer to the reason given in the plaint, for

impleading defendants 2 and 3. In paragraph 15, it is stated:

"Though no relief by way of recovery of possession can be legally claimed against them in this suit still they are proper parties to the action in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit and to prevent multiplicity of suits".

It has been explained before us that this course was adopted at the instance of the Advocate-General who, when applied to for sanction, wished to make sure that it will not be a collusive suit between the plaintiffs and the first defendant, as the only persons interested in asserting that the suit property was private property and not trust property, were defendants 2 and 3. If this is what happened, the plaintiffs would have run a serious risk if they had deleted the names of defendants 2 and 3 from the record. (Cf. *Mohadeen Saheb* v. *Fakruddin Saib*[1].)

The first defendant remained *ex parte* and died during the pendency of the suit. As anticipated by the Advocate-General, the second and third defendants contended that the suit was collusive and that the plaint property did not belong to any trust and much less to a public, religious or charitable trust. They further took the objection that they were neither necessary nor proper parties to the suit and that the suit was bad for misjoinder of parties and causes of action.

The learned Subordinate Judge found that the suit property had been dedicated to a public charitable trust and had been used as such from 1880 to 1903. On the fourth issue which raised the question of misjoinder he held that as defendants 2 and 3 claimed right to the suit property they were necessary parties to the suit and that the suit was not bad for multifariousness.

Two questions have been argued in this appeal on behalf of the third defendant: (1) on the merits, that the learned Judge should have held that a trust within the meaning of S. 92, Civil Procedure Code, had not been established; (2) as a question of procedure, that the learned Judge should have held that defendants 2 and 3 were neither necessary nor even proper parties to the suit.

The question on the merits may be briefly disposed of. The intention to build a choultry in the name of the first

1. (1924) 21 L.W. 71.

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defendant's adoptive father was stated in Ex. A as early as in 1875. The evidence shows that the choultry was built between 1880 and 1885 and this is confirmed by the recital in Ex. B. Some years after attaining majority the first defendant brought O. S. No. 53 of 1887 against his adoptive mother; and in compromising it, the parties entered into the agreement Ex. D-1 wherein the choultry is referred to as an existing charity and provision is made for its management by first defendant's paternal uncle and, after his death, by the first defendant. Even in the lease deed (Ex. G) taken by the first defendant in June, 1897, in respect of a portion of the suit property, the building is referred to as "the charity choultry" which came to him under Ex. D-1 after the death of his paternal uncle. And provision is made therein for a lamp being lit every evening and kept at the entrance of the choultry.

The documents above referred to establish the dedication of the suit property beyond all doubt and with the oral evidence adduced on the plaintiff's side, they prove that till about 1903 the building must have been used for the purpose of the trust. The fact that since 1903 the first defendant has ignored the trust or used the property in breach of trust cannot affect its trust character.

On behalf of the appellant it was suggested that as the first plaintiff was only entitled to a widow's estate she could not have validly dedicated the property. It is enough to say in answer that she purported to act under her husband's direction and that the first defendant has, even after he attained majority, accepted the trust by Ex. D-1. It was also suggested that the trust, if any, should be held to attach only to the building and not to the adjoining vacant land. But the adjoining land would seem to form part of the appurtenances required for the convenient use of the building; and the description of the property in the schedule to Ex. D-1 makes it clear that the building as well as the adjoining vacant land constituted the endowment.

As to the point of law, the reference to it in issue 4 as an objection on the ground of "multifariousness" is not accurate, because no *relief* has been claimed against defendants 2 and 3 on any independent cause of action. Appellant's learned Counsel therefore urged the objection only as one to the joinder of defendants 2 and 3 in view of the limited scope of

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the Court's jurisdiction under S. 92, Civil Procedure Code. He relied strongly on the decision of the Rangoon High Court in *Johnson Po Min* v. *U Ogh*[1] and also contended that the observations of Mr. Justice Mukerjee in *Budh Singh Dudhuria* v. *Niradbaran Roy*[2] and *Gholam Mowlah* v. *Ali Hafiz*[3] and of Sir John Wallis in *Raghavalu Chetty* v. *Pellati Sitamma*[4], support his objection. In all these cases relief had in fact been asked for against the third parties and the learned Judges rightly held that the balance of authority in this country was against granting such relief in suits under S. 92, Civil Procedure Code. With due respect, I am however constrained to hold that some observations in these cases are too broadly expressed whatever the position may be. When an absolute *stranger* in possession of property alleged to belong to the trust either denies the trust or pleads adverse possession against the trust, it seems to me a distinction ought to be drawn between such a case and one in which a person who has come into possession of the alleged trust property through or in the right of the settlor or of a trustee, denies the existence of the trust or the title of the trust to the property in his possession. It does not seem to me right to assimilate the position of the latter to that of a trespasser. It is well-settled that the mere fact of a trustee *de jure* or *de facto* denying the existence of the trust or the title of the trust to the property in his possession does not oust the jurisdiction of the Court under S. 92, Civil Procedure Code. Is there sufficient justification for treating differently a case in which the trust is denied by one who came into possession under or claims in the right of the settlor or trustee? It is unnecessary for the purpose of this case to discuss the position of an alienee who admitting the trust seeks to maintain the validity of the alienation in his favour.

It may for the purpose of this case be taken that in a suit under S. 92, Civil Procedure Code (as under S. 530 of the old Code) no relief could be granted as against third parties. The question for consideration is whether from this:

"It follows, as a necessary corollary, that the Court is not competent to bring before the forum any such person." (*Gholam Mowlah* v. *Ali Hafiz*[3].)

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1. (1932) I.L.R. 10 Rang. 342.
2. (1905) 2 C.L.J. 431 at 439.
3. (1915) 28 C.L.J. 4 at 18.
4. (1914) 27 M.L.J. 266 at 267.

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In *Abdur Rahim* v. *Mahomed Barkat Ali*[1], the Judicial Committee advert to the fact that Courts in India have differed considerably on the question whether third parties could or should be made parties to such a suit; but they refrain from expressing any opinion of their own on the point. It has been pointed out to us that their decision on the question of *res judicata* raised in that case rests on the ground that a suit under S. 92 ceases to be a representative suit when once strangers are added as parties and reliefs not covered by S. 92 are included, and from this, it has been contended that it must be taken to be their view that in a suit under S. 92 no binding adjudication can be made on a point in which a stranger is interested. I am unable to accept this argument. The principle of *res judicata* was there invoked by the person who denied the title of the trust and he relied for that purpose on a consent decree in a former suit. Their Lordships doubted whether a plea of *res judicata* could in the circumstances be founded on a consent decree at all. In an earlier page (page 524) they had referred to the fact that the addition of strangers as parties and of a declaratory prayer had been made without the sanction of the Advocate-General and it is in the light of this circumstance that they said on page 531 that in so far as the nature of the suit had been changed by the amendmen s mentioned, the suit ceased to be one of a representative character. This cannot be treated as any authority bearing on a case where all the parties had been impleaded with the knowledge and consent of the Advocate-General and no relief not falling within S. 92 has been asked for. (Cf. *Maher Hussein* v. *Ali Mahomed*[2].)

It may be convenient, before referring to the Indian authorities to make a few general observations. It was at one time thought that the scope of the enquiry to be held and the reliefs obtainable under the corresponding section of the old Code was limited by the analogy of proceedings under Lord Romilly's Act. But this view is no longer tenable in view of the amendments introduced in the Code of 1908, making it clear that a proceeding under S. 92 may be *contentious* and may result in the removal of a trustee. The view taken in many of the English cases has been coloured by the fact that the procedure under Lord Romilly's Act was avowedly

1. (1927) 54 M.L.J. 609: L.R. 55 I.A. 96: I.L.R. 55 Cal. 519 (P C.).
2. A.I.R. 1934 Bom. 257 at 260.

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summary and the remedy by way of 'information' was always open to the Attorney-General. (*See* Ex parte *Skinner*[1] and Ex parte *Skinner*[2].) The procedure under S. 92 of the Indian Code is in no sense *summary*; and so far at any rate as the Advocate-General is concerned, it is doubtful if the section can be regarded as prescribing only a *cumulative* remedy in the sense that he has a right of suit independently of the section; the second clause of S. 92 would indicate the contrary. It must also be remembered that it was only as a matter of judicial discretion that relief under Lord Romilly's Act was limited to cases of 'plain and simple' breaches of trust, where the question arose only between the trustee and *cestui que trust.* As early as in Ex parte *Rees*[3] Lord Eldon indicated that it was not a question of want of jurisdiction in the Court to decide an adverse claim. Under the Charitable Trusts Act of 1853, the Court of Appeal held that on summons, the Court had jurisdiction to decide whether the property which was the subject of the summons was held upon a Charitable Trust or not (In re *Norwich Town Close Estate Charity*[4]). In view of these considerations Mukerjee, J., took care in *Budh Singh Dudhuria* v. *Niradbaran Roy*[5] to say that he was not basing his opinion upon the decisions under Lord Romilly's Act. Mukerjee, J., refers to the observation of Turner, L.J., in *Attorney-General* v. *Corporation of Avon*[6] that persons claiming a title adverse to a trust should not be made parties to a suit for the execution of the trust. This remark was made in a proceeding arising out of an 'information' and not on a mere petition—the reason for it—and this must be borne in mind in applying here the dicta in the Chancery cases—is to be found in the division of jurisdiction between the Common Law Courts and the Courts of Chancery and the distinction between Common law actions and proceedings in Equity. An action raising a question of title must be filed in the Common Law Courts and the Court of Chancery would not undertake to decide such a question. This principle coloured the legislation in England as well as the decision relating to charities. (See

1. (1817) 2 Mer. 453: 35 E.R. 1013.
2. (1818) 1 Wils. Ch. 14: 37 E.R. 7.
3. (1814) 3 V. & B. 10: 35 E.R. 382.
4. (1888) 40 Ch. D. 298.
5. (1905) 2 C.L.J. 431 at 440.
6. (1863) 3 De G. J. and S. 637: 46 E.R. 783.

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Holme v. *Guy*[1] and *Glen* v. *Gregg*[2]; note *Attorney-General* v. *Sidney Sussex College*[3] and in the Charitable Trusts Act of 1853, there was an express provision (in S. 17) excluding proceedings in which any person shall claim any property or seek relief adversely to any charity. S. 92 of the Indian Civil Procedure Code has no doubt been modelled on the practice of the Chancery Courts, but as that division of jurisdiction is not part of the law of this country, limitations arising out of that conflict of jurisdictions have no direct application here.

The non-inclusion of certain kinds of relief in S. 92, Civil Procedure Code, has, if I may say so with due respect, sometime been misinterpreted. If a relief is specified in that section, the result *will be* that a suit for that relief cannot be brought except with the consent of tbe Advocate-General or the Collector. It was certainly not the intention of the legislature that *every* suit which may in any sense relate to a trust should be brought only after obtaining such consent. A trustee could undoubtedly sue for the possession of the trust property without such consent; and if the beneficiaries may in certain circumstances be entitled to ask that possession of the trust property be given to a trustee (cf. *Venkataramana Aiyangar* v. *Kasturiranga Aiyangar*[4] and *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar*[5]) it was apparently not the intention of the legislature that they should obtain the consent of the Advocate-General or the Collector before filing such a suit. This aspect of the matter has to be emphasised because it will show that the non-mention of certain reliefs in S. 92 is not necessarily with a view to impose a disability upon the Court as to make it clear that in respect of those reliefs the previous consent of the Advocate-General or Collector to the institution of the suit is not necessary. It is true that a decree for possession in favour of the plaintiffs is not contemplated in suits under S. 92, Civil Procedure Code, but that is sufficiently accounted for by the fact that the plaintiffs in such suits will be relators who will not *prima facie* be entitled to possession. Again it is true that S. 92 is in a sense an *enabling* section in that it confers on two or more members of the public a right to seek relief without any proof of *special damage*. But once the Court is moved, the scope of its enquiry must be determined in the light of

1. (1877) 5 Ch. D. 901.
2. (1882) 21 Ch. D. 513.
3. (1867) 15 W.R. 162.
4. (1916) 31 M.L.J. 777: I.L.R. 40 Mad. 212 (F.B.).
5. (1917) 33 M.L.J. 357: I.L.R. 41 Mad. 124.

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what is germane to the various matters indicated in S. 92 and not by reference to the *right* of plaintiffs to particular *reliefs*.

What is the appropriate procedure when certain persons interested in a trust desire to have the trust character of certain property established as against a person in possession as the heir at law or one claiming through an alleged settlor or trustee, when the latter denies the trust? In cases of this kind it may sometimes happen that there is no trustee at all, *de jure* or *de facto*. It cannot be contended that persons interested in the performance of the trust cannot in such cases institute a suit under S. 92 for the appointment of a trustee and for the framing of a scheme and for other necessary directions. But the very first step in such a suit will be for the Court to be satisfied that there is a trust in respect of which its intervention is necessary. The only person interested in denying the trust may be the heir at law or other person in possession. Is it legitimate or desirable that the Court should determine the question of the existence of a trust without hearing the only person who is concerned to deny it?

If the question is to be determined with reference to the general consideration governing the joinder of parties, there can be little doubt as to the proper course. The rules relating to joinder are based on the principles of avoiding of multiplicity of suits not merely as involving waste of time and money but also possible conflict of decisions *Benecke* v. *Frost*[1]. Even in proceedings relating to charities, it is a consideration well worth bearing in mind that if the so-called third party gets an opportunity of having his title investigated in his presence he may well abide by the conclusion then arrived at and may not insist on another suit being filed merely for the formal relief by way of recovery of possession (cf. *Attorney-General* v. *Pretyman*[2]). It is not necessary to justify the addition of a defendant that he should be interested in all reliefs or questions arising between the plaintiff and the other defendants. (*Swansea Shipping Company* v. *Duncan*[3].)

As to the test for determining who are proper parties, see *Keshavram* v. *Ranchhod*[4], *Secretary of State* v. *Murugesa*[5] and the authorities referred to there.

1. (1876) 1 Q.B.D. 419.
2. (1845) 8 Beav. 316: 50 E.R. 124.
3. (1876) 1 Q.B.D. 644.
4. (1905) I.L.R. 30 Bom. 156 at 161.
5. A.I.R. 1929 Mad. 443.

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The decision of the Privy Council in *Vaidyanatha Aiyar* v. *Swaminatha Aiyar*[1] is instructive in this connection. The defendants in that case were no doubt trustees, but not of the trust alleged in the plaint. The plaintiffs claimed that Suri Aiyar himself had held them only as a trustee but the defendants contended both before the High Court and before the Privy Council that no trust of the kind alleged by the plaintiffs existed before Suri Aiyar's will. As pointed out by their Lordships, the defendants claimed to be trustees under the will of Suri Aiyar who had purported to deal with the property as his own; they were *in Law* strangers to the trust alleged in the plaint and yet neither the High Court nor the Privy Council felt any hesitation in deciding, in their presence and in a suit under S. 92, Civil Procedure Code, the question whether or not there had been a dedication of the kind alleged in the plaint. After the Court had found in favour of the trust, a further point was raised as to whether or not certain properties had been bequeathed to the trust by the will of one Swaminatha Aiyar. It was contended before the High Court on behalf of the defendants that the Court was not entitled in that suit to go into the question of the construction of Swaminatha Aiyar's will. But the High Court said:

> " We accept the contention (of the plaintiffs) that under S. 92, Civil Procedure Code, when we are asked to frame a scheme, one of the essential enquiries to be made is what are the properties belonging to the charity. . . . . As the defendants who are in possession of the choultry and its properties deny that the choultry is entitled to any benefits under the provisions of the will as claimed by the plaintiff, it is open to us to go into the question ". (*Vaithinatha Aiyar* v. *Thyagaraja Aiyar*[2].)

With this may be compared the following remarks of Cotton, L.J., in In re *Norwich Town Close Estate Charity*[3]:

> " It is essential that the Court which directs a scheme to be prepared and settled should have jurisdiction to decide that there is a charity with reference to which a scheme can be directed ".

The learned Lord Justice no doubt added that:

> " If there are persons claiming adversely to a charity and who are not willing to abide by the opinion of the Court as to whether it is a charity or not, then in order to enforce the charity as against these adverse claimants, there must be an information because on the summons there is no jurisdiction to enforce a scheme against adverse claimants ".

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1. (1924) 47 M.L.J. 361: L.R. 51 I.A. 282: I.L.R. 47 Mad. 884 (P.C.).
2. (1919) 41 M.L.J. 20 at 28.
3. (1888) 40 Ch. D. 298 at 309.

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But this observation can only refer to the *enforcement* of the claim of the trust and not to the declaration of the existence of the trust, for in that very case the declaration was made in the presence of and in spite of the objection of those who denied the trust. The succeeding sentence as to the scope of the relief obtainable on an "information" and the remarks of Lindley, L.J., make this clear. When *Vaithinatha Aiyar* v. *Thyagaraja Aiyar*[1] case went before the Privy Council, the question of the existence of the trust alleged in the plaint as well as that relating to the construction of Swaminatha Aiyar's will were decided on the merits and no objection was raised either by their Lordships or by Mr. Upjohn, K.C., to the propriety of these matters being dealt with in the presence of the defendant and under S. 92 though the preliminary objection as to the plaintiff's *interest* under that section was discussed at some length.

Venkatanarasimha Rao v. *Subba Rao*[2] is another instance of the same type. The defendant in possession there was the heir at law of the person who was alleged to have bequeathed properties to a trust and objection was taken on his behalf that S. 92, Civil Procedure Code, does not apply to a case where the defendant claims property under some title in denial of the trust (*see* argument at page 304). The objection was overruled and Spencer, J., observed (at page 310) that:

"The person who is the heir at law and in possession of the property which is impressed with the character of trust property has an interest and is a proper party to such a suit".

The other learned Judge (Devadoss, J.) observed (on page 324):

"The defendant claims to repudiate the provisions of the will. . . . . . His interests are no doubt adverse to that of the plaintiffs who want to maintain that there is a trust. . . . . No doubt the defendant in this suit could not be made to pay amounts due to or to surrender the properties, if any, belonging to the trust, he being a stranger to the trust. On the framing of a scheme and on the appointment of trustees he should be proceeded against by the trustees for such reliefs as they may deem fit. In this sense no doubt the suit is unsustainable, but the suit is perfectly competent for the purposes of enabling the Court to frame a scheme in respect of the charitable bequest contained in the will".

The learned Judge felt no doubt as to the propriety of retaining the defendant as a party to the proceeding in which

1. (1919) 41 M.L.J. 20 at 28. 2. (1922) I.L.R. 46 Mad. 300.

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they were called upon to determine the effect and validity of the provisions in the will.

In *Evalappa Mudaliar* v. *Balakrishnammal*[1] Venkatasubba Rao, J., points out some of the anomalies that must result from the view that a person who denies or repudiates the trust cannot be impleaded in a suit under S. 92, Civil Procedure Code. In *Subramania Aiyar* v. *Venkatachala Vadhyar*[2] the learned judges (Ayling and Srinivasa Aiyangar, JJ.) clearly assume that in a suit under S. 92, Civil Procedure Code, a finding can be given that certain properties are trust properties in the presence of persons interested to deny that fact and this they do after referring to the decisions in *Raghavalu Chetty* v. *Pellati Sitamma*[3] and *Rangasamy Naidu* v. *Chinnasamy Iyer*[4]. This shows a recognition of a distinction between a finding that the property in question belongs to the trust and a declaration that an alienation of trust property is not binding on the trust. In view of the experience of the learned Judges who decided the case, the authority of the case is not, in my opinion, diminished by the fact that (on page 451) they refer to the agreement of counsel to have the decree so amended 'as to make it clear' that the finding as to the trust character of the property should be binding on the alienee in future proceedings. In the Rangoon case *Johnson Po Min* v. *U Ogh*[5] the learned Chief Justice starts with the assumption (on page 349) that S. 92 which is found in the chapter headed "special proceeding" must have the same scope and object as was ascribed by Lord Eldon in Ex parte *Skinner*[6] to proceedings under Lord Romilly's Act. He would recognise no distinction between the question as to the existence or non-existence of a trust as an institution or in respect of particular properties and the question of the validity of that particular alienation of what is admitted to be trust property. He assumes that because a decree for possession could not be given in favour of the plaintiff, it must follow that the Court cannot consider any question relating to the title of the trust to property if it is denied by a stranger. With due respect, I venture to think, for the reasons above indicated, that these assumptions are not correct, nor is his final argument that in suits under S. 92 the

1. (1927) 53 M.L.J. 183.
2. (1916) 4 L.W. 444.
3. (1914) 27 M.L.J. 266.
4. (1915) 28 M.L.J. 326.
5. (1932) I.L.R. 10 Rang. 342.
6. (1817) 2 Mer. 453: 35 E.R. 1013.

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plaintiffs cannot invoke the provisions of O. 1, r. 10, Civil Procedure Code. Amongst the Madras cases, he relies on the observations of Sir John Wallis in *Raghavalu Chetty* v. *Pellati Sitamma*[1] and makes a passing reference to *Evalappa Mudaliar* v. *Balakrishnammal*[2] only to express his dissent from it. He does not refer to any of the Madras decisions above dealt with. He realises that even in *Raghavalu Chetty* v. *Pellati Sitamma*[1] the observations of Seshagiri Aiyar, J., are to a different effect, but he thinks that in *Venkataramana Aiyangar* v. *Kasturiranga Aiyangar*[3] Seshagiri Aiyar, J., resiled from this opinion. I must confess I am unable to see anything in the judgment of Seshagiri Aiyar, J., in *Venkataramana Aiyangar* v. *Kasturiranga Aiyangar*[3] that can be interpreted as going back upon the opinion expressed by him in *Raghavalu Chetty* v. *Pellati Sitamma*[1] as to the propriety of having third parties before the Court in certain circumstances, though no relief can be granted against them. The learned Counsel who argued the case before us on behalf of the appellant has not been able to point to any such thing in the judgment in *Venkataramana Aiyangar* v. *Kasturiranga Aiyangar*[3]. If the learned Chief Justice had in view the observation on page 231, I may observe that they only show that Mr. Justice Seshagiri Aiyar regretted that suits even for *relief* by way of declaration or possession had not been included in S. 92, Civil Procedure Code, but felt bound by the weight of authority to hold that such relief could not be granted in suits under S. 92. There is nothing in this that is opposed to his judgment in *Raghavalu Chetty* v. *Pellati Sitamma*[1] because even there he agreed with Sir John Wallis that neither possession nor even a declaration as to the invalidity of an alienation could be given. It is, after a statement of that conclusion that the learned Judge nevertheless held that the alienees would be *proper* parties. In *Vaithilingam* v. *Ramalingam Pillai*[4] which was decided some months after *Venkataramana Aiyangar* v. *Kasturiranga Aiyangar*[3] the learned Judge (sitting with Ayling, J.) referred, with apparent approval to *Raghavalu Chetty* v. *Pellati Sitamma*[1] and affirmed the application of O. 1, r. 10, Civil Procedure Code, to suits under S. 92. In *Parameswaram Munpu* v. *Narayanan Nam-*

1. (1914) 27 M.L.J. 266. 2. (1927). 53 M.L.J. 183.
3. (1916) 31 M.L.J. 777 : I.L.R. 40 Mad. 212 (F.B.).
4. (1916) 6 L.W. 9.

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budri[1] the learned Judges assume that O. 1, r. 10 is applicable to suits under S. 92, Civil Procedure Code.

Proceeding now to the observation of Sir John Wallis in *Raghavalu Chetty* v. *Pellati Sitamma*[2] it will be noticed that he was of opinion that the alienee defendants would be proper parties "If they had desired to be made parties", but that they ought not to be made parties against their will. It seems to me that this distinction suggests a consideration of *convenience* rather than an objection of *want of jurisdiction*; because, if it is a question of absence of jurisdiction in the Court itself, it is difficult to see how the consent of the alienee-defendants will make them proper parties: Cf. *Glen* v. *Gregg*[3]. The observations are more on the lines of the English authorities on Lord Romilly's Act and the Charitable Trusts Act. Thus, in In re *Norwich Town Close Estate Charity case*[4] to which reference has already been made, Cotton, L.J., remarked:

"Here Mr. Warrington's clients say: 'We want this question settled in the most inexpensive way possible'. That amounts to this, that if the Court has jurisdiction, as I think it has, to decide that this is a charity, they will not insist on being treated as adverse claimants, nor refuse to allow the rents of the property or of the land to be enjoyed by the charity without an adverse decree against them compelling them to hand over the property to those who under the charity are entitled to it." (*See also* the last sentence of the Vice-Chancellor's judgment in In re *Magdalar Land Charity*.[5])

It is not clear whether Sir John Wallis was of opinion that O. 1, r. 10, Civil Procedure Code, cannot be availed of in suits under S. 92, Civil Procedure Code. The observations of Mukerjee, J., in pages 17 and 18 of *Gholam Mowlah* v. *Ali Hafiz*[6] equally leave it in doubt whether the learned Judge was of opinion that the rule did not apply or merely that it was of no assistance in the circumstances of the particular case, Sanderson, C.J., only refers to O. 1, r. 3 and not to r. 10. I do not refer at any length to the decisions of the High Court of Allahabad and Bombay because Page, C.J., recognises that they not merely permit the joinder of third parties but would even go further. I respectfully agree with the opinion expressed in *Lachman Prasad* v. *Munia*[7].

It was argued on behalf of the appellant that it would be anomalous to have a stranger as a party to the suit when no

1. (1916) 31 M.L.J. 279: I.L.R. 40 Mad. 110.
2. (1914) 27 M.L.J. 266.
3. (1882) 21 Ch. D. 513.
4. (1888) 40 Ch. D. 298.
5. (1852) 9 Hare 624.
6. (1915) 28 C.L.J. 4.
7. (1925) I.L.R. 47 All. 867 at 871.

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relief could be awarded against him, because, it was said, he would have no right to appeal against any adverse finding and such finding could not therefore operate as *res judicata.* Assuming that the existence of a right of appeal in the party affected is a necessary condition for the application of the rule of *res judicata* (as to which see *Muthaya Shetti* v. *Kanthappa Shetti*[1]), I am not satisfied that the so-called stranger will not have a right of appeal against an adverse finding, merely because no decree for possession or even by way of declaration is passed against him. The decree actually passed in the suit will presumably rest on the finding and the finding cannot therefore be regarded as *unnecessary*; if so, there is authority in favour of permitting a right of appeal to such stranger, though there may be no decree against him. (See *Ranganatham Chetty* v. *Lakshmiammal*[2], *Kottayya* v. *Mallayya*[3], *Raghava Aiyangar* v. *Irula Thevan*[4], *Venkateswarlu* v. *Lingayya*[5] and *Secretary of State* v. *Saminatha Koundan*[6].) Further, it will in all probability happen in such cases that there will be an award of costs against him when his claim of title was found against and that itself may suffice to enable him to canvass the finding in an appeal. (Cf. *Ramakrishna Naidu* v. *Krishnaswami Naidu*[7].) Even if the finding cannot for any reason operate as *res judicata,* it cannot altogether be valueless; apart from the chances of the third party accepting a finding arrived at in his presence, the opinion expressed by Seshagiri Iyer, J., in *Raghavalu Chetty* v. *Pellati Sitamma*[8], as to its possible effectiveness is supported by the observations of the Judicial Committee in *Midnapur Zamindari Co.* v. *Naresh Narayan Roy*[9]. In their Lordships' words it will certainly create a paramount duty on the part of the defeated claimant to displace that finding.

I am therefore unable to accept the contention that the appellant ought not to have been impleaded in this suit. I would dismiss the appeal with costs.

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1. (1915) 24 M.L.J. 431.
2. (1913) 25 M.L.J. 379.
3. (1911) 9 M.L.T. 39.
4. (1926) 51 M.L.J. 211.
5. (1924) I.L.R. 47 Mad. 633.
6. (1911) 21 M.L.J. 947 : I.L.R. 37 Mad. 25.
7. (1918) 36 M.L.J. 641 at 645 and 646.
8. (1914) 27 M.L.J. 266 at 269.
9. (1920) L.R. 48 I.A. 49 : I.L.R. 48 Cal. 460 at 467 and 468 (P.C.).

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Stodart, J.:—The suit in the lower Court was under S. 92 of the Civil Procedure Code, in connection with a public religious trust—

(1) to remove the first defendant from the office of trustees;

(2) to appoint a new trustee;

(3) to vest the property of the trust in the new trustee with necessary directions;

(4) to settle a scheme for the management of the trust.

The facts are accurately stated by the lower court. Vasudeva Chetty died in 1875 without male heirs and in the same year his widow, Abhayambal, 1st plaintiff, adopted the 1st defendant Malayaperumalswamy aged twelve. By a formal deed of adoption Abhayambal divested herself of half her husband's property in favour of the 1st defendant and out of the other half set apart so much as was necessary to build a choultry for Vaishnava pilgrims, declaring that the residue should be enjoyed by her for her lifetime and after her death utilised for the feeding of pilgrims using the said choultry. Krishnaswami Chetty an uncle of her deceased husband was appointed to build the choultry and to manage the property vested in the 1st defendant. In 1885 the choultry was opened and the land on which it stood which belonged to Krishnaswami Chetti himself was formally conveyed to the 1st defendant. Two years later 1st defendant had occasion to file a suit against his adoptive mother for possession of the properties vested in him by the adoption deed and in the compromise which ended that suit he expressly affirmed the existence of the choultry and declared that it should continue to be managed by Krishnaswami Chetti and the expenses of it defrayed out of the proceeds of such of the movable property of the estate as had not been handed over to him (the 1st defendant); and that after him the 1st defendant himself should manage it. Krishnaswami Chettiar died in 1893. From 1903 onwards the 1st defendant treated the choultry as his own, letting it out for rent and mortgaging it. The suit is to restore the building to its original purpose, to remove first defendant from its management and to frame a scheme for its management. The first defendant did not contest the suit. The second defendant declared that he had purchased a share in the choultry from a man who had purchased it from a son of the 1st defendant—a title which he did not prove—and

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third defendant is a man who has purchased the choultry in execution of a decree against the 1st defendant. They contended that there was no valid public trust, and if there was, the building had never been dedicated and used for the purposes of the trust. The lower Court has found that there was a validly constituted public trust, that 1st plaintiff as founder and second plaintiff as founder's kin, were competent to institute a suit under S. 92, that the whole site in which the building is situated and which was conveyed to the 1st defendant in 1885 is the property of the trust, that the objects of the trust were carried out so far as was then possible by the construction of the choultry.

The findings of fact of the lower Court are clearly correct and so far as they have been appealed against, the appeal must certainly fail. Undoubtedly the choultry was built out of the proceeds of property dedicated for the purpose. Undoubtedly it was used as a halting place by pilgrims up to 1903 when the 1st defendant began to divert it from its proper purpose. Appellant's (3rd defendant) learned Counsel argues that the lower Court was wrong in holding that the choultry was used for the purpose for which it was intended. This argument proceeds on the wrong assumption that the purpose was the feeding of pilgrims. According to the clear intention of the documents to which I have already referred the purpose was the lodging of pilgrims. Feeding of pilgrims is provided for but is only to begin after the death of the 1st plaintiff when the property in her hands and on the profits of which she lives becomes available for that purpose. The matter is really too clear to admit of any discussion.

It was also objected by the defendants after the 1st plaintiff had given her evidence in the lower Court, and it was taken on commission, that 1st plaintiff had not signed the plaint and so the plaint was incompetent since S. 92 requires that the suit be filed by two persons. The lower Court found that the 1st plaintiff made her mark in the plaint after its contents had been read out to her. This objection is made again on appeal but it has only to be stated to be rejected. It is founded in two isolated sentences in 1st plaintiff's deposition:

I. "I asked 2nd plaintiff to file the suit. . . . . . I do not know if there is any body else as plaintiff along with him".

II. "I did not sign any paper when it was read out to me".

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The second statement is literally true. Plaintiff made her mark. She did not sign the plaint. As for the first statement, 1st plaintiff cannot be understood as saying that she herself was not a plaintiff along with the 2nd plaintiff. I am surprised at such a flimsy objection being taken and more surprised at its being repeated on appeal. In the result the finding of the lower Court on the substantive part of the suit must stand and the decree, namely, for the appointment of a new trustee and the framing of a scheme for management be confirmed.

The lower Court directed 2nd and 3rd defendants to pay the costs of the suit. But they contended from the beginning that they were not necessary or proper parties. And third defendant in his appeal has raised the point again. At the same time it is perfectly clear that, 1st defendant being *ex parte*, and after his death no person being appointed as his legal representative, it was the 2nd and 3rd defendants who questioned the validity of the trust and the competence of the plaintiffs to file the suit. And in his appeal the 3rd defendant has challenged all the findings of the lower Court.

The lower Court held:

"The 2nd and 3rd defendants were impleaded because they had acquired a right to the suit properties; they were therefore necessary parties to the suit;"

And this is the only question which deserves consideration in this appeal. Stated consisely it is:

"Are alienees from a trustee of property belonging to the trust necessary parties or proper parties to a suit under S. 92 of the Civil Procedure Code"?

Section 92 is:

"In the case of any alleged breach of any . . . . trust created for public purposes of a charitable or religious nature or when the direction of the Court is deemed necessary for the administration of any such trust the Advocate-General or two or more persons having an interest in the trust. . . . . . may institute a suit to obtain a decree . . . .

(*a*) removing any trustee;

(*b*) appointing a new trustee;

(*c*) vesting any property in a trustee;

(*d*) directing accounts and inquiries;

(*e*) declaring what proportion of the trust property . . . . . shall be allocated to any particular object of the trust;

(*f*) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;

(*g*) settling a scheme;

(*h*) granting such further or other relief as the nature of the case may require."

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In the prayer portion of their plaint the plaintiffs do not pray for any relief against the 2nd and 3rd defendants. But it is clear that they desired the Court to make a declaration that the alienations made in favour of these defendants were not binding on the trust. In paragraph 15 of the plaint it is averred:

"Though no relief by way of recovery of possession can legally be claimed against them in this suit, still they are proper parties to this action in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit."

And since, the only questions involved in the suit relating to these defendants arises out of the fact that they are in possession of trust property, denying the trust, it is implied in the sentence quoted above that the Court could grant relief against them by way of declaration that the alienations in their favour are not binding on the trust. In the result the lower Court made no such declaration. Its finding was that the choultry was a public religious trust, that the plot of land in which it stood belonged to the trust, that a new trustee should be appointed and a scheme settled. As 1st defendant died during the course of the suit it was not necessary for the Court to direct that he be removed for the reasons alleged in the plaint but it did find that since 1903 he had been acting in violation of the trust by dealing with the property as his own. There was ample material to support this finding in the acts proved against the 1st defendant apart from the transactions by which 2nd and 3rd defendants acquired title to the property.

It is now settled law that no such declaration can be had in a suit under S. 92. In the Full Bench case of this Court, *Venkataramana Aiyangar* v. *Kasturiranga Aiyangar*[1] a representative suit to set aside a lease granted by a Devasthanam committee to certain of the defendants, of the right to collect and appropriate offerings made by pilgrims, it was pleaded in bar that the suit should have been brought under S. 92. It was held that S. 92 does not apply to a suit the object of which is to establish that the property in the hands of the strangers belongs to the trust and to recover the same. The residuary cl. (*h*) "granting such further or other relief, etc." does not apply; nor does cl. (*c*) "vesting any property in a trustee" for the reason that since the alienation is void *ab initio* the trustee was never divested of it. On this point of impleading stranger alienees to a suit under S. 92, Abdur Rahim, Offg. C.J., says:

1. (1916) 31 M.L.J. 777: I.L.R. 40 Mad. 212 (F.B.).

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"The legislature might well have thought that where the main object of a suit is to secure a proper administration of the trust it is not desirable to complicate matters by allowing questions being raised between the trust on the one hand and third parties claiming adversely to the trust". (P. 229.)

And another of the other learned Judges (Seshagiri Aiyar, J.) who was a party to that decision says, after a minute analysis of the provisions of S. 92:

"It would be doing violence to the language employed to hold that possession against strangers is within the purview of S. 92. The same observations hold good with reference to declarations".

And in *Abdur Rahim* v. *Mahomed Barkat Ali*[1] where also S. 92 was pleaded in bar of a representative suit to declare the title of the trust to alienated property, and where it was contended that sub-S. (*g*) "granting such further and other relief" included such cases, the Privy Council saw no reason to consider that S. 92 was intended to enlarge the scope of S. 539 by the addition of any relief or remedy against third parties, that is, strangers to the trust. They are aware that the Courts in India have differed considerably on the question whether third parties could or should be made parties to a suit under S. 539 (of the old Code) but the general current of decisions was to the effect that even if such third parties should properly be made parties under S. 539, no relief could be granted as against them. One reason why a declaration touching the title to trust properties made in a suit under S. 92 can have no binding force against the alienee-defendants is obvious. Such a suit may be filed either by the Advocate-General or by any two persons having interest, who have obtained his consent. In neither case can the plaintiff nor plaintiffs be presumed to have an intimate knowledge of the affairs of the trust to know exactly what the properties of the trust are; or to be able to ascertain exactly the circumstances which attended the alienations they attack. If then they fail to demonstrate that the alienations are not binding on the trust and a finding to the contrary is made in the suit, is the trust to suffer on that account? Is the title of the alienees to be confirmed for all time, although a properly informed trustee with access to all the accounts of the trust might successfully impeach it in a suit framed for the purpose. To hold in that sense would be to extend the scope of S. 92 to a most undesirable extent. But if a declaration of title against the trust is not to be binding on the trust it can hardly be

1. (1927) 54 M.L.J. 609: L.R. 55 I.A. 96: I.L.R. 55 Cal. 519 at 530 (P.C.).

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binding against the alienees. The findings to the contrary in *Ghazaffar Husain Khan* v. *Yawar Husain*[1] and *Manohari* v. *Muhammad Ismail*[2] are not good law.

It is clear, therefore, that no remedy or relief can be granted in a suit under S. 92, against defendants who are impleaded on the ground that they deny the title of the trust to the properties in their possession. They are not necessary parties to such a suit. The question remains "Are they proper parties"? In *The Collector of Poona* v. *Bai Chanchalbai*[3] it was held that "when the alienee denies that the property is a public trust for religious purposes . . . . if that question is in controversy, * * * * * it cannot be properly tried unless the alienee is before the Court. He is therefore a necessary party". It might be objected, however, that neither can the question be properly tried unless the trust is properly represented and that it cannot be said that the trust is properly represented by the persons who happen to be plaintiffs under S. 92. Again, while it is often desirable and sometimes necessary in a suit under S. 92 that the Court should determine what the trust properties are, are the plaintiffs therefore bound to seek out and implead every person who disputes the title of the trust in the case of every item of the trust property?

There are two recent cases of this Court in which it has been held that persons in possession of trust property who deny the title of the trust are proper parties to a suit of this kind. *Venkatanarasimha Rao* v. *Subba Rao*[4] was a case where the endowment was by will and the endowed property was in the hands of the heir at law who ignoring the will refused to appropriate to the trust that part of the income which was designated by the testator for that purpose. At the time of the suit the executors appointed under the will were dead, and there was no trustee. The heir at law was impleaded as sole defendant and pleaded that the suit against him was not maintainable. Of the two learned Judges who decided that case, Spencer, J., held that:

"The person who is the heir at law and in possession of the property which is impressed with the character of trust property had an interest and is a proper party to such a suit."

1. (1905) I.L.R. 28 All. 112.
2. (1911) I.L.R. 33 All. 752.
3. (1911) I.L.R. 35 Bom. 470.
4. (1922) I.L.R. 46 Mad. 300.

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And the finding of Devadoss, J., is:

" No doubt the defendant in this suit could not be made to pay amounts due, or to surrender the property belonging to the trust, he being a stranger to the trust........ In that sense, no doubt, the suit against the defendant is unsustainable, but the suit is perfectly competent for the purpose of enabling the Court to frame a scheme ".

The second case is *Evalappa Mudaliar* v. *Balakrishnammal*[1] in which Venkatasubba Rao, J., as he then was, held that the suit was maintainable though the defendant was in the position of an alienee who set up a claim adverse to the trust. There was no trustee in that case and the Court found it difficult to answer the question who was to be made a defendant. The present case is stronger for the reason that the alienee defendants deny the existence of the trust altogether. On the other hand *Johnson Po Min* v. *U Ogh*[2] of the Rangoon High Court where all these cases have been considered is an emphatic statement of the opposite view. Page, C.J., concludes an exhaustive review of the cases with the words:

" Strangers to the trust are not proper or necessary parties to a suit under S. 92, and in such a suit the plaintiffs who have wrongly impleaded third parties cannot pray in aid the provisions of O. 1, r. 3 or O. 1, r. 10. "

It has been strongly contended by the learned Counsel for the respondent that the defendants not only deny the title of the trust to the choultry, claiming that it was the private property of the first defendant, but also deny the existence of the trust, and that to decide whether there is a valid trust or not it was necessary for a complete and effectual adjudication to bring these defendants on record. It has been held in *Mussammat Khursaidi Begum* v. *Secretary of State*[3] that the question whether there is a valid trust or not is not within the scope of S. 92. Per Ross, J.:

" In my opinion S. 92 is not applicable. S. 92 regulates suits where there is a breach of an express or constructive trust . . . . . but here the suit is to establish the existence of the trust itself. . . . . . . A suit of this nature is not within the purview of S. 92."

It appears to me that this is too narrow a construction of S. 92. Persons suing under that section have to establish as their cause of action: I. That there is a trust express or constructive created for public purposes of a charitable or religious nature. II. That it has been broken. In that view persons who deny the title of the trust and on that footing claim to be

1. (1927) 53 M.L.J. 183. 2. (1932) I.L.R. 10 Rang. 342.
3. (1926) I.L.R. 5 Pat. 539.

in possession of property which is necessary to the proper discharging of that trust are proper parties to the suit, in the sense that in their absence the Court cannot effectually and completely adjudicate the question. Is there a valid trust the performance of which requires that the trustees should be in possession and control of this property? With respect I see no sufficient reason in the Patna case to justify my differing from the decision of this Court in *Venkatanarasimha Rao* v. *Subba Rao*[1]. The second and third defendants were therefore proper parties to the suit.

In the result this appeal is dismissed with costs.

S. V. V. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD RUSSELL OF KILLOWEN, LORD MACMILLAN AND SIR JOHN WALLIS.

Nathu Mal .. *Appellant**

v.

Raman Mal and others .. *Respondents.*

Mortgage—Construction of covenant—Subsistence of prior encumbrance—Clause conferring power of sale free of encumbrance—Need for clear and express words—Effect of clause being to destroy security—Mode of construction.

The properties which constituted security for a simple mortgage dated 15th May, 1919, executed in favour of one *N* consisted of two houses and a shop in Amritsar and two shops in Lahore. The two shops in Lahore were subject to two mortgages in favour of one *R* dated respectively 26th February, 1906 and 9th March, 1918, while the entire mortgaged property was subject to a mortgage in favour of one *L* dated 5th May, 1917. The mortgage in favour of *N* was executed for the purpose of paying off the mortgage in favour of *L*. The security was expressed to be subject to *R's* mortgage of 26th February, 1906, over the two shops at Lahore. The deed contained a clause dealing with the absence of any encumbrances beyond the said mortgage in favour of *R* and concluded thus: "If I sell any house out of the property I will pay the entire sale proceeds thereof to the mortgagee and will not take credit for the interest on the amount paid. In other words we will not deduct interest". The mortgage loan having been advanced *L* was duly paid off. Two years thereafter the mortgagors sold the two shops in Lahore to *R* and the sale deed after reciting the two mortgages in favour of *R* mentioned that there was no other encumbrance on the property. The sale price remaining payable after adjustment of the mortgage debt payable to *R* was received in cash by the vendors. Subsequently, the vendors paid a certain sum of money to *N* towards the mortgage debt, but *N* himself was not aware of the sale in favour of *R*. *N* sued to enforce his mortgage and impleaded the mortgagors and *R*.

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1. (1922) I.L.R. 46 Mad. 300.

* P. C. Appeal No. 19 of 1936. 18th February, 1937.

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Held, that *N* was entitled to enforce his security, and that the sale in favour of *R* could not be set up as against him, as the mortgage deed did not have the effect of conferring a power on the mortgagors to sell the property free from the encumbrance. The effect of the mortgage document was that the mortgagor was to have the power to redeem part without redeeming the whole of the mortgaged property, a power consistent with the preservation of the security over the property sold until the mortgagee has concurred in the sale and received the purchase money.

The essence of a transaction by way of loan on security is that the lender, unwilling to rely solely on the personal liability of the borrower, requires in addition to be given a right *in rem*; and to insert in the same document a provision by which the borrower bestows the required right *in rem*, and a provision enabling the borrower to destroy it forthwith, is a proceeding difficult to contemplate as probable. To reach such a conclusion the Court would require language admitting of no possible doubt as to its meaning. If any other inference is possible not inconsistent with or repugnant to the deed, it should be drawn in preference to an inference which may result in the destruction of the security.

Decision of the Lahore High Court reversed.

Appeal from a decree of the High Court of Lahore dated 5th July, 1934, modifying the preliminary and final decrees of the Senior Subordinate Judge of Amritsar dated 21st December, 1928 and 25th February, 1929.

De Gruyther, K.C. and *J. M. Parikh* for Appellant.

Dunne, K.C. and *Plowman* for Respondents.

18th February, 1937. Their Lordships' judgment was delivered by

Lord Russell of Killowen.

LORD RUSSELL OF KILLOWEN.—In this appeal their Lordships are called upon to construe a mortgage instrument which may be fairly described as a primitive piece of conveyancing, the language of which is sadly lacking in clearness and precision.

It is dated the 15th May, 1919. The parcels which constitute the security for the loan consisted of two houses and a shop in Amritsar, and two shops in the city of Lahore. The two shops in Lahore were subject to two mortgages in favour of one Raman Mal dated respectively the 26th February, 1906, and the 9th March, 1918, while the whole of the above-mentioned property (including the two shops in Lahore) was subject to a mortgage in favour of one Lala Balla Mal dated the 5th May, 1917. It was for the purpose (*inter alia*) of paying off this last mentioned mortgage that a sum of Rs. 13,500 was borrowed from the appellant Nathu Mal, and the repayment thereof was secured by the deed of the 15th May, 1919. The security was for a fixed term of two years

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and carried interest at a rate equivalent to $7\frac{1}{2}$ per cent. per annum. After the two years had expired the rate rose to the equivalent of 9 per cent. per annum. The security was expressed to be subject to Raman Mal's mortgage of the 26th February, 1906, over the two shops at Lahore. The mortgagors were described as being "Ram Das for myself and as a guardian of Kishan Dayal minor, my adopted son aged 14 years and Bal Kishan."

The deed contains (according to the translation in the record) at the end of a lengthy clause (dealing with the absence of any encumbrances beyond the said mortgage of Ram Das, with the rights of the mortgagee against the mortgagors personally, and his right on enforcing his security to interest at 9 per cent. per annum) the following words:—

"If I sell any house out of the property I will pay the entire sale-proceeds thereof to the mortgagee and will not take credit for interest on the amount paid. In other words we will not deduct interest."

Nathu Mal duly advanced the Rs. 13,500, and Lala Balla Mal was duly paid off. More than two years later Ram Das and Bal Kishan purported to sell the two shops in Lahore to Raman Mal for the sum of Rs. 13,000, and they executed in his favour a sale deed thereof dated the 22nd October, 1921. The sale deed recites Raman Mal's two mortgages, that a sum of Rs. 4,215 is due for principal and interest thereunder, and that no other encumbrance exists on the property. It further recites that the price of Rs. 13,000 has been paid, as to Rs. 500 by deposit paid on the 23rd September, 1921, as to Rs. 4,215 by deduction for principal and interest due on the two mortgages, and as to the balance Rs. 8,285 in currency notes. It would appear that subsequently some Rs. 7,000 were paid to Nathu Mal on account of his mortgage debt, but it has been found as a fact and cannot now be disputed that Nathu Mal was unaware of the sale to Raman Mal and never consented thereto.

On the 12th July, 1928, Nathu Mal brought the present suit to enforce his mortgage security. He joined as defendants the mortgagors and Raman Mal. Subsequently on Ram Das becoming insolvent the Official Receiver was added as a defendant, but he did not appear. Raman Mal was joined as a mortgagee holding a prior mortgage on the two shops at Lahore.

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At the trial before the Senior Subordinate Judge, both Ram Das in his evidence, and Raman Mal by his counsel, contended that the sale to Raman Mal had been made with the express authority and consent of Nathu Mal. Ram Das testified that " he was telling me to sell the Lahore property and pay him off." The Judge disbelieved this story.

In the result the Judge made a preliminary decree for sale (dated the 22nd December, 1928), which fixed the 22nd February, 1929, as the date for redemption. It declared that the amount due to Nathu Mal for principal, interest and costs calculated up to that date was Rs. 10,852 14a. 3p. and that such amount should carry interest at 6 per cent. per annum until realisation; that the amount due to Raman Mal on his prior mortgage was Rs. 1,900 and on his subsequent mortgage was Rs. 3,533 4a. op. calculated up to the 22nd February, 1929. There then followed the usual provisions contained in a preliminary decree, but framed so as to provide for the sale of the Lahore properties only in the event of the proceeds of sale of the Amritsar properties proving insufficient to answer the claims of Nathu Mal, and so as to preserve the priority of Raman Mal's prior mortgage. No redemption having taken place on or before the appointed day, a final decree for sale was passed on the 25th February, 1929.

In calculating the sum of Rs. 10,852 14a. 3p. the Judge had made a deduction from the principal moneys alleged to be secured and had calculated interest only at 6 per cent. per annum.

Raman Mal appealed (No. 809 of 1929) from the preliminary decree, and asked by his memorandum of appeal to have a declaration added to the decree that he had a prior charge on the Lahore property to the extent of the money received by Nathu Mal out of the proceeds of the sale to Raman Mal, and the amount spent by Raman Mal on repairs and improvements to the property. He also appealed (No. 1024 of 1929) in similar terms from the final decree.

Nathu Mal appealed from both decrees, on two points, namely, (1) the reduction made by the Judge in the amount of principal secured by his mortgage and (2) the fixing of the rate of interest at 6 per cent. and not at 9 per cent. per annum.

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The mortgagor Bal Kishan appealed on the ground that Nathu Mal's mortgage was not binding upon him.

The appeal of Bal Kishan was dismissed with costs, and no question now arises in respect of it.

The appeals of Nathu Mal failed except to the extent that the High Court decided that in respect of the period from the expiration of the first two years of the currency of the mortgage to the date fixed for redemption, interest should be calculated at 9 per cent. per annum, and the amount found due on the said date was increased to Rs. 11,447 5a. 9p. accordingly. These matters are not now in dispute and disappear from the case.

The appeals of Raman Mal succeeded upon a point which apparently had not been argued or suggested before the Subordinate Judge, and which does not appear in Raman Mal's grounds of appeal, namely, that upon the true construction of Nathu Mal's mortgage deed, there was conferred upon the mortgagors or upon Ram Das a power which enabled them or him at any time to sell and transfer any part of the mortgaged property freed from the mortgage security, without either knowledge or consent on the part of the owner of the security.

Such a power, if conferred, is certainly a remarkable provision to find a place in a mortgage, for it would appear to be of a nature inconsistent with and indeed repugnant to the essential object of the deed which contains it. The essence of a transaction by way of loan on security, is that the lender, unwilling to rely solely on the personal liability of the borrower, requires in addition to be given a right *in rem*; and to insert in the same document a provision by which the borrower bestows the required right *in rem*, and a provision enabling the borrower to destroy it forthwith, is a proceeding difficult to contemplate as probable. To reach the conclusion that such is the intention and operation of a mortgage security, their Lordships would require to be confronted with language admitting of no possible doubt as to its meaning.

The Judges of the High Court have held that the words quoted earlier in this judgment are an express provision enabling Ram Das to pass a valid title free from the security, and that his failure to pay the whole purchase money to Nathu Mal is no concern of Raman Mal. But there is in fact no such express provision in the deed; all that the clause says in

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terms is that if Ram Das does sell a house he will pay over the entire proceeds to the mortgagee. Any further operation of the clause can only be extracted by inference. If any other inference is possible not inconsistent with or repugnant to the deed, it should be drawn in preference to an inference which may result in the destruction of the security.

In their Lordships' opinion it is impossible to say that the words used are sufficiently clear to justify the drawing of an inference productive of such jeopardy to the security; and not the less so in view of the fact that no provision is made for the mortgagee being informed either of an intention to sell or of the fact of a sale having taken place. He might never hear of it, or have the means of hearing of it, until years later when seeking to enforce his security, he would find it to be non-existent.

If it be desired to confer so drastic a power upon a mortgagor in the future, it will be necessary for those who frame the security to make express provision for that purpose in language free from all doubt or ambiguity.

As was pointed out by the Subordinate Judge a mortgagor is not entitled, unless authorised by the mortgage deed, to redeem the mortgaged property piecemeal. It appears to their Lordships that the more probable and reasonable inference to be drawn from the words used, is that the mortgagor is to have power to redeem part without redeeming the whole of the mortgaged property, a power consistent with the preservation of the security over the property sold until the mortgagee has concurred in the sale and received the purchase money.

The Judges of the High Court relied upon the decision in the case of *Asa Ram* v. *Kishan Chand*[1] in support of their view. Their Lordships find it difficult to understand that decision upon the relevant point; for it would appear from the mortgage deed (clause 12) that there could be no release of property from the security until the mortgagee had received the purchase money and released the property sold. It is reasonably clear that in that case the provision enabling the mortgagor to sell, was merely a provision enabling him to redeem piecemeal, and not a provision enabling him to deprive the mortgagee of his security by means of a sale made by the

1. A.I.R. 1930 Lah. 386.

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mortgagor without the consent and concurrence of the mortgagee.

One other point must be mentioned. It was suggested on behalf of the appellant that the clause in question could have no reference to the Lahore shops because it referred to a house, and not to a shop. This narrow construction does not commend itself to their Lordships.

It follows from what has been said that this appeal should succeed, and accordingly a fresh date for redemption must be fixed (see *Jagannath Prosad Singh Chowdhury* v. *Surajmal Jalal*[1] and *Satindra Nath Choudhury* v. *Jatindra Nath Choudhury*).[2] Their Lordships think that in the circumstances a date (hereinafter referred to as the new date for redemption) being two calendar months after receipt by the High Court of His Majesty's Order in Council will be a suitable date. The decree of the High Court must be discharged as also the final decree of the 25th February, 1929. The decree of the Subordinate Judge of the 22nd December, 1928, will be restored, but with the following variations:—(1) The new date for redemption must be substituted throughout the said decree for the 22nd February, 1929, and (2) the amount due to Nathu Mal for principal interest and costs up to the new date for redemption must be calculated upon the footing of Rs. 11,447 5a. 9p. having been due on the 22nd February, 1929, and interest being chargeable up to the new date for redemption at the rate of 9 per cent. per annum, and the amount so due must be substituted throughout the said decree for the sum of Rs. 10,852 14a. 3p.

Their Lordships will humbly advise His Majesty accordingly. As regards costs the respondent Raman Mal must pay the appellant's costs of this appeal and also his costs of Raman Mal's appeals Nos. 809 and 1024, and must repay such costs of those appeals as have already been paid to him by the appellant.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondents: *Saunders, Sobell, Greenburgh & Co.*

R. C. C. —— *Appeal allowed.*

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1. (1926) 52 M.L.J. 373: L.R. 54 I.A. 1: I.L.R. 54 Cal. 161 (P.C.).
2. (1935) 69 M.L.J. 503: L.R. 62 I.A. 265: I.L.R. 63 Cal. 1 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Srimathu Raja Muthu Vijaya Raghunatha Doraisingam *alias* Gowri Vallaba Thevar Avergal, Zamindar of Sivaganga through Subramanya Ayyar, Dewan and authorised Agent .. *Appellant** (*Defendant No. 1*)

v.

Muthu K. R. M. Muthayya Chettiar and others .. *Respondents* (*Plaintiffs 1 to 5 and 2nd Defendant*).

Zamindar of Sivaganga *v.* Muthayya Chettiar.

Court of Wards Act (I of 1902), S. 49—Notice by a Proprietor to the ward—Representatives of his interest suing in regard to boundary dispute—Notice containing no mention of plaintiff's address—Notice whether satisfying requirements of S. 49—Construction of—Effects and consequences of.

Where some persons who were proprietors of a village in a Zamindari sought to set aside the decision of the appellate survey authority in a boundary dispute between their village and an adjoining one belonging to the Zamindar, who was under the Court of Wards at the time, and the question turned upon the point whether there was sufficient notice satisfying the provisions of S. 49 of the Madras Court of Wards Act, in that the plaint relied upon a notice given by a former proprietor whose interest was purchased by the plaintiffs later on, wherein no mention was made of the place or abode of the intending plaintiffs who sued the defendant represented by the Collector.

Held, that provisions like those of S. 49 of the Court of Wards Act should be construed in the light of well-established general principles of law, and that notice given by a person, when it otherwise satisfied the requirements of law, should be available for the benefit of persons claiming under him.

Bachchu Singh v. *The Secretary of State for India in Council*, (1902) I.L.R. 25 All. 187; *Muhammad Siddiq Ali Khan* v. *Anwar-ul-Hasan*, (1923) I.L.R. 45 All. 563 and *Mahadev* v. *Secretary of State*, (1930) 32 Bom.L.R. 604, not followed.

Venkata Rangiah Appa Rao v. *The Secretary of State for India in Council*, (1930) 59 M.L.J. 923: I.L.R. 54 Mad. 416 and *Venkata Rangiah Appa Rao* v. *The Secretary of State*, (1935) 41 L.W. 591, relied on.

Legal representatives and assignees must *prima facie* be taken to be included in any reference to a person in a statute, unless the reason of the rule of law cannot clearly apply to anybody but the original owner of the property. *Ramakrishnama Chetti* v. *Vuvvati Chengu Aiyar*, (1914) 27 M.L.J. 494.

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* C.M.A. No. 338 of 1933. 31st October, 1935.

Bhagchand Dagadusa v. *Secretary of State for India,* (1927) 53 M.L.J. 81: L.R. 54 I.A. 338: I.L.R. 51 Bom. 725 (P.C.), followed.

It is much more consistent with the purpose of provisions like S. 80, Civil Procedure Code and S. 49, Court of Wards Act, to hold that notwithstanding the physical identity of the person, a notice given in one character will not avail when the claim is made in the other character, than to hold that the physical identity of the individual is the deciding factor.

(2) If the view was correct that the plaintiffs were entitled to maintain the suit as 'representatives' of the predecessor who sent the notice, the nature of the reliefs asked for was such that they could obtain all they wanted in that capacity and it was immaterial that their interest in the village was larger than that of the original owner.

Appeal against the order of the District Court of Ramnad at Madura dated the 23rd day of January, 1933, and passed in A.S. No. 3 of 1932 preferred against the decree of the Court of the Subordinate Judge of Ramnad at Madura, dated the 23rd day of October, 1931 and passed in O.S. No. 24 of 1929.

S. T. Srinivasagopala Chariar for Appellant.

R. Kesava Aiyangar for Respondents 1 to 5 and Respondent 6 unrepresented.

The Court made the following

ORDER.—Before deciding this appeal, it will be more satisfactory to have a finding on the question:

"Whether at the time the notice Ex. A was given, Singa Dorai had been registered as 'proprietor' under the Limited Proprietors Act in respect of the suit village and whether he ceased to be so at the time the suit was instituted."

The District Court may either by itself or through the Court of the Subordinate Judge, take such evidence as the parties may tender in relation to this question.

The finding will be submitted to the High Court before the 1st March, 1935. Ten days will be allowed for filing objections to the finding.

[In compliance with the order above the District Judge of Ramnad submitted the following

FINDING.—I find that Singa Dorai has not been registered as proprietor under the Limited Proprietors Act in respect of the suit village. The second part as to whether he ceased to be so at the time the suit was instituted, therefore, does not call for a finding.]

Zamindar of Sivaganga *v.* Muthayya Chettiar.

This appeal came on for hearing after return of findings.

The Court delivered the following

JUDGMENT.—This is an appeal against an order of remand passed by the District Court of Ramnad, where it reversed the decision of the trial Court on the sixth issue in the case. That issue was in the following terms:

"Has notice of suit been given to the first defendant as required by law ?"

The only point for determination now is whether the decision of the lower appellate Court on that issue is not correct.

The question arises in connection with a suit filed by the members of a Nattukottai Chetty family, seeking to set aside the decision of the appellate survey authority in a boundary dispute under the Survey and Boundaries Act. The plaintiffs are at present the proprietors of a *jivitham* village in the Sivaganga Zamindari known as Kilayur and the dispute related to the boundary between that village and the adjoining Ayan village of Elayangudi belonging to the Sivaganga estate. At the time of the institution of this suit, the Sivaganga estate was under the management of the Court of Wards; the Zamindar was accordingly impleaded as the first defendant, represented by the Estate Collector. The issue now under consideration was raised in view of the terms of S. 49 of the Madras Court of Wards Act which prescribes a two months' notice as a condition precedent to the institution of a suit relating to the person or property of any ward. The second clause of that section provides that:

"Such notice shall state the name and place of abode of the intending plaintiff, the cause of action and the relief which he claims."

The plaint relied upon a notice given by one *D* Singa Dorai Thevar on 2nd May, 1928 (Ex. A). From the documentary evidence in the case, it appears that this Singa Dorai was the owner of one half of Kilayur, the present plaintiffs being owners of the other half, that Singa Dorai had been registered as landholder under the Estates' Land Act under a decree of Court (Ex. E), that an attempt on the part of the plaintiffs, in 1924, to get a member of their family registered as landholder proved unsuccessful and that Singa Dorai was regarded

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as the "senior" proprietor of the village, apparently with reference to clause 6 of S. 3 of the Survey and Boundaries Act. So far as I am able to gather from the papers filed in the case, the proceedings before the Survey authorities were conducted by Singa Dorai alone, though he must presumably have acted on behalf of all the co-owners. Reading Ex. A in the light of these circumstances its terms are significant. Singa Dorai there describes himself in paragraph (1) as the 'senior proprietor,' refers in paragraph 3 to the possession and enjoyment of himself and his *co-sharers* and, when stating the reliefs in paragraph 10, refers to an injunction restraining the Zamindar from interfering with the enjoyment of the suit plots by himself *and his co-sharers*. But it will also be noticed that the names and addresses of his co-sharers are nowhere stated in the notice. To complete the narrative of events, I may state that before the institution of this suit, the plaintiff's family became purchasers of Singa Dorai's interest under Ex. G dated 24th September, 1928, through an intermediate sale under Ex. F dated 29th August, 1928. That is apparently the reason why Singa Dorai himself is not a party to this suit.

There can be little difficulty in holding that if Ex. A could be relied on by the plaintiffs, it sufficiently complies with *two* of the requirements of S. 49 of the Court of Wards Act, namely, statement of the cause of action and statement of the relief. The question for consideration therefore relates to the third requirement under that section, namely, statement of the name and place of abode of the intending plaintiff.

In the first Court, the learned Subordinate Judge was of opinion that Ex. A could not be availed of by the plaintiffs; he held that a notice of suit could be held to comply with the section only when the person who gave the notice is himself the plaintiff. On appeal, the learned District Judge was of opinion that Ex. A could be availed of by the plaintiffs because it was a notice given by Singa Dorai "as representing the estate", that is, on behalf of all the co-owners; he thought it immaterial that the names and abodes of the plaintiffs had not been set out in Ex. A.

The view of the lower appellate Court on the interpretation of S. 49 and the construction of Ex. A has been criticised before me on behalf of the appellant; but, before dealing with

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this point, it will be convenient to dispose of two contentions urged on behalf of the respondent. It was argued (*i*) that no notice was necessary in this case and (*ii*) that at any rate, the objection on the score of want of notice was no longer available to the appellant whose estate has now ceased to be under the Court of Wards. In support of the first contention, reliance was placed upon the decision in *Rajah of Ramnad* v. *Subramaniam Chettiar*[1]. The question there arose in connection with a claim suit under O. 21, r. 63, Civil Procedure Code; and Phillips, J. (with whom Odgers, J., apparently agreed on this point) held that as the claim suit must be deemed to be a *continuation* of the earlier claim proceedings, no fresh notice under S. 49 of the Court of Wards Act was necesssary. This decision has been commented upon by Venkatasubba Rao, J., in *Rangasami Goundan* v. *Errappa Gounder*[2]. (*See also* observations of Wallace, J., in *Subramanyam* v. *Narasimham*[3].) If the facts here were the same as in *Rajah of Ramnad* v. *Subramaniam Chettiar*[1], the decision would be binding upon me; but, as pointed out by Venkatasubba Rao, J., a suit like the present stands on a different footing from a claim suit, at least for one reason, namely, whereas in a claim suit the prior proceedings will ordinarily be in a Civil Court, the survey proceedings cannot reasonably be regarded as proceedings in a Civil Court. The institution of the suit to set the survey decision aside must therefore be deemed to be the initiation of the proceeding, so far as the Civil Court is concerned. With respect, I agree with Venkatasubba Rao, J., that it is difficult to exclude a suit like the present from the scope of S. 49. The decision of Anantakrishna Aiyar, J., in S. A. No. 1296 of 1926 has also been explained in *Rangasami Goundan* v. *Errappa Gounder*[2]. The learned Judge no doubt refers to the possibility that the suit under S. 14 of the Survey and Boundaries Act may be viewed as a continuation of the proceedings before the Survey authorities; but, as I read that judgment, he refers to that theory only to reinforce his argument that there was no *act* of the local authority which was called in question in that suit, so as to attract the operation of S. 225 of the Local Boards Act. On Letters Patent Appeal, L. P. A. No. 101 of 1930, the decision of Anantakrishna Aiyar, J.,

1. (1928) I.L.R. 52 Mad. 465. 2. (1934) 67 M.L.J. 426.
3. (1928) 56 M.L.J. 489 at 497.

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was confirmed only on the ground that the suit was not one of the kind provided for in S. 225.

In support of the other contention advanced on behalf of the respondents, their learned advocate argued that the objection of want of notice was available only to the Court of Wards and must therefore cease to have any force as soon as the Court of Wards gave up management, even though it be during the pendency of the suit. He maintained that the absence of notice will not make the institution of the suit illegal, because it has been held in cases under S. 80, Civil Procedure Code, that the objection of want of notice may be waived. I am unable to accept this contention. Cases like *Bhola Nath Roy* v. *Secretary of State for India*[1], are not really analogous, because while in suits contemplated by S. 80, Civil Procedure Code, the Secretary of State is a *party*, the Court of Wards is not the party in suits contemplated by S. 49 of the Court of Wards Act. The objection in the latter class of cases is really taken on behalf of the ward and as long as he continues to be a party, the fact that the management of his estate has changed hands, can make no difference. It may be that the cessation of the management by the Court of Wards may release him from certain disabilities (cf. *Atma Ram* v. *Beni Prasad*[2]) but there is nothing in the Act or in general principles to deprive him on this ground of a plea which the legislature has enacted for the benefit of his estate. The observation of Sadasiva Aiyar, J., in *Jagana Sanyasiah* v. *Atchanna Naidu*[3], that when a Receiver ceases to be on the record of a suit the objection as to want of sanction of the Court which appointed him also ceases to be available, must be understood in the light of the fact that the Receiver himself was a party to the suit (unlike a guardian *ad litem*) and of the reason given by the learned Judge that the sanction is required in such cases only as a matter of respect to the appointing Court. There is no question of waiver in this case, because the 1st defendant has all along been insisting on the objection to the sufficiency of notice.

On the main question, I am unable to confirm the decision of the lower appellate Court on the particular ground assigned

1. (1912) I.L.R. 40 Cal. 503.
2. (1935) L.R. 62 I.A. 257: I.L.R. 57 All. 678 (P.C.).
3. (1921) 42 M.L.J. 339 at 343.

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in its judgment. Whether a statement of the names and abodes of *all* the intending plaintiffs is necessary to enable the Court of Wards to settle the dispute if they so chose is not a matter that the Court is free to speculate upon. There have been interesting discussions in the Courts as to the sufficiency of the address given in the notice (cf. *Eales* v. *Municipal Commissioners*[1], *James* v. *Swift*[2] and *Osborn* v. *Gough*[3]). But no decision (except *Secretary of State* v. *Perumal Pillai*[4]) has upheld a notice that did not at all contain the names and abodes of *some* of the intending plaintiffs. In the words of Lord Mansfield in *Taylor* v. *Fenwick*[5]:

"The Legislature has thought fit to prescribe a precise form. Whether right or not, it does not matter."

It may be, as pointed out in *Bhola Nath Roy* v. *Secretary of State for India*[6] that it is not necessary that the notice should be *signed* by all the intending plaintiffs (cf. *Mohini Mohun Das* v. *Bungsi Buddan Saha Das*[7]). Having regard to the joint family system and the co-ownership system prevailing in this country, I am inclined to concur in the opinion of the learned District Judge that a notice of suit may be given by one or some of several joint owners or co-owners on behalf of all. But I see no hardship in insisting that the names of all the owners who, it is intended, should join as plaintiffs in the suit, should be specified (with their addresses) in the notice. I can quite realise the extravagance of requiring the names of babies in a joint family being required to be specified but it does not seem to me necessary that such babies or minors should be joined as plaintiffs in the suit. All that S. 49 requires is the specification of the name and abode of the "*intending* plaintiff" which must be taken to mean all the *plaintiffs* where they are more than one.

It is true that several cases have recognised that provisions like those of S. 49 must be held to be satisfied by a substantial compliance and that a notice must be fairly and reasonably construed in respect of its contents. But I cannot hold that the theory of substantial compliance is applicable where

1. (1890) I.L.R. 14 Mad. 386.
2. (1825) 4 B. & C. 681 : 107 E.R. 1214.
3. (1803) 3 Bos. & Pul. 551 : 127 E.R. 297.
4. (1900) 11 M.L.J. 117 : I.L.R. 24 Mad. 279.
5. (1803) 3 Bos. & Pul. at p. 554 : 127 E. R. at p. 299 (Note).
6. (1912) I.L.R. 40 Cal. 503 at 509.
7. (1889) I.L.R. 17 Cal. 580 (P.C.).

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the names of co-sharers figuring as plaintiffs in the suit are wholly absent from the notice.

At the time that the decision of the learned District Judge was pronounced in this case, the judgment in *The Secretary of State for India* v. *Perumal Pillai*[1] stood unchallenged and the decision of Sundaram Chettiar, J., in *Venkata Rangiah Appa Rao* v. *Secretary of State for India*[2] which certainly departed from *Secretary of State for India* v. *Perumal Pillai*[1], remained as the judgment of a single Judge. The learned District Judge therefore felt himself at liberty to take what he calls a 'common sense' view of the matter in the light of *Secretary of State for India* v. *Perumal Pillai*[1]. I may observe in passing that it is very doubtful if even the judgment in *Secretary of State for India* v. *Perumal Pillai*[1] can help a case where the person who gave the notice does not figure as plaintiff at all. The decision in *Venkata Rangiah Appa Rao* v. *Secretary of State for India*[2] has since been confirmed by a Division Bench on Letters Patent Appeal (vide *Venkata Rangiah* v. *Secretary of State for India*[3]). The view taken in *Venkata Rangiah Appa Rao* v. *Secretary of State for India*[2] has also been followed by a learned Judge of the Bombay High Court in *Secretary of State* v. *Hargovandas*[4]. The result is *Secretary of State for India* v. *Perumal Pillai*[1] can no longer be regarded as of unchallenged authority.

It is not for me to comment upon the judgment in *Venkata Rangiah* v. *Secretary of State for India*[3] But I may respectfully observe that the consequences of the wide rule there laid down may, in many cases, especially where the claimants are joint owners or co-owners, be evaded, by impleading as *defendants* the co-owners whose names and addresses have not been given in the notice. On the other hand, it will be a regrettable result if in suits on behalf of joint families, for instance, the plaint should be *wholly* rejected because some members not born at the date of the notice or who were minors at the time have been omitted from the notice but added as plaintiffs in the suit. It is common knowledge that in this country suits are postponed to the last possible day and in cases of the kind suggested, a new suit after a notice in proper form may be out of time.

1. (1900) 11 M.L.J. 117: I.L.R. 24 Mad. 279.
2. (1930) 59 M.L.J. 923: I.L.R. 54 Mad. 416.
3. (1935) 41 L.W. 591.
4. (1935) 37 Bom. L.R. 341.

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I am however of opinion that the lower appellate Court's decision on the 6th issue may be affirmed on another ground. As will appear from the narrative already given, the plaintiffs are purchasers of Singa Dorai's interest under sale deeds subsequent to the date of the notice, Ex. A, that is, in law they are his representatives in interest. I am of opinion that provisions like those of S. 49 of the Court of Wards Act must be construed in the light of well-established general principles of law, and that a notice given by a person, when it otherwise satisfies the requirements of law, must be available for the benefit of persons *claiming under* him. I am aware that the decisions of the Allahabad High Court in *Bachchu Singh* v. *Secretary of State for India in Council*[1] and *Muhammad Siddiq Ali Khan* v. *Anwar-ul-Hasan*[2] and of the Bombay High Court in *Mahadev* v. *Secretary of State*[3] are opposed to this view. But, with due respect to the learned Judges, I am unable to follow those decisions. *Mahadev* v. *Secretary of State*[3] is to some extent distinguishable as laying stress on the omission from S. 80 of the Civil Procedure Code of 1908 of the word 'intending' from the expression "intending plaintiff" found in S. 424 of the old Code; but the decision in *Bachchu Singh* v. *Secretary of State for India in Council*[1] was on the same expression as is found in S. 49 of the Court of Wards Act. The learned Judges of the Allahabad High Court held that to permit the successor to rely on a notice given by his predecessor will amount to *adding* words to the section. This is only a reiteration of the view which in certain well-known classes of cases has been superseded by the enactment of S. 146 in the Civil Procedure Code. Very much like the same view was enunciated in certain decisions of this Court which held that on the death of a decree-holder or judgment-debtor, no execution petition pending at the death could be *continued* by or against the legal representatives. This again has been overruled by a Full Bench *Venkatachalam Chetti* v. *Ramaswamy Servai*[4], cases like *Lalit Mohan Mandal* v. *Satish Chandra Das*[5] and *Subbiah* v. *Sundara Boyamma*[6] furnish no true analogy because there is

1. (1902) I.L.R. 25 All. 187.
2. (1923) I.L.R. 45 All. 563.
3. (1930) 32 Bom.L.R. 604.
4. (1931) 62 M.L.J. 1: I.L.R. 55 Mad. 352 (F.B.).
5. (1906) I.L.R. 33 Cal. 1163.
6. (1927) 54 M.L.J. 582: I.L.R. 51 Mad. 697.

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no justification in the present case for the assumption that the right is only a 'personal right'. I respectfully adopt the view stated in *Ramakrishnama Chetty* v. *Vuvvati Chengu Aiyar*[1] that legal representatives and assignees must *prima facie* be taken to be included in any reference to a person in a statute, unless the reason of the rule of law cannot clearly apply to anybody but the original owner of the property. The observation of Seshagiri Aiyar, J., in *Ramarayanimgar* v. *Maharajah of Venkatagiri*[2] about the rule of liability being 'too broadly stated' in *Ramakrishnama Chetty* v. *Vuvvati Chengu Aiyar*[1] does not touch the present question. I see nothing inconsistent with the decision of the Privy Council in *Bhagchand Dagadusa* v. *Secretary of State for India*[3] in holding that these statutory provisions for notice must be construed in the light of well-established general principles. There is no question here of whittling down the statutory requirement or controlling it by extraneous considerations.

Mr. Justice Sundaram Chettiar has no doubt referred to the decisions in *Bachchu Singh* v. *Secretary of State for India*[4] and *Mahadev* v. *Secretary of State*[5] but he refers to them only by way of analogy. As the appellate Bench has not based its decision upon these cases, I think I am at liberty to deal with the question on its own merits. I notice that even in *Venkata Rangiah Appa Rao* v. *Secretary of State for India*[6] the second plaintiff was a purchaser from the first, but it is not possible to gather from the report whether the purchase was before the date of the notice given by the 1st plaintiff or after the date of the notice. I have examined the printed papers; they disclose no further information than is contained in the Letters Patent Appeal judgment that there was no formal sale deed but the 2nd plaintiff had been put in possession under an agreement for sale. Nothing is stated as to the date of the agreement or transfer of possession. It is only if the 2nd plaintiff's title had accrued subsequent to the notice that he could be held to claim *under* the first, in the sense in which that expression is used in such context. Sundaram Chettiar, J., lays stress upon the

1. (1914) 27 M.L.J. 494.
2. (1920) 40 M.L.J. 236: I.L.R. 44 Mad. 301 at 318.
3. (1927) 53 M.L.J. 81: L.R. 54 I.A. 338: I.L.R. 51 Bom. 725 (P.C.).
4. (1902) I.L.R. 25 All. 187.
5. (1930) 32 Bom.L.R. 604.
6. (1930) 59 M.L.J. 923: I.L.R. 54 Mad. 416.

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fact that the suit claimed relief on behalf of *both* the plaintiffs; this leads me to think that the case did not proceed on the footing of one person claiming under another. Before the Letters Patent Appeal Bench the only question canvassed was:

"Whether the suit brought by two plaintiffs is maintainable when the notice required by S. 80, Civil Procedure Code, was given by the 1st plaintiff only."

The answer, in the words of the learned Chief Justice, was:

"Where there are more plaintiffs than one claiming relief, those plaintiffs are required to give the notice."

Sundaram Chettiar, J., no doubt observes that

"there should be identity of the person who issued the notice with the person that brings the suit".

In a sense, this will be correct, that is, if legal identity is all that is required and the transferee or heir is *in law* the continuation of the *persona* of the transferor or ancestor. But, I am not, with all respect, prepared to accept the correctness of the statement of the learned Judge, if *physical* identity of the person is to be insisted on. To take a converse illustration, it is well established that notwithstanding physical identity, a person claiming in his own right is legally different from the same person claiming as a trustee. It seems to me much more consistent with the purpose of provisions like S. 80, Civil Procedure Code or S. 49 of the Court of Wards Act to hold that notwithstanding the physical identity of the person, a notice given in one character will not avail when the claim is made in the other character than to hold that the physical identity of the individual is the deciding factor.

It was lastly pointed out that the plaintiffs are now suing as "full" proprietors of the village of Kilayur whereas they could have acquired only one half from Singa Dorai. I do not think this circumstance brings the case within the decision in *Venkata Rangiah* v. *Secretary of State for India*[1]. If I am right in the view that plaintiffs are entitled to maintain this suit as 'representatives' of Singa Dorai, the nature of the reliefs asked for is such that they can obtain all they want in that capacity and it is immaterial that their interest in the village is larger than that of Singa Dorai.

1. (1935) 41 L.W. 591.

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I accordingly confirm the order of the lower appellate Court though for different reasons and dismiss the appeal. In the circumstances I make no order as to costs.

Leave to appeal granted.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE BURN.

C. Sendilvelu Mudaliar .. *Appellant* (1st Defendant)*

v.

A. Venkatasubbu Mudaliar and others .. *Respondents (Plaintiff, 3rd Defendant and Nil).*

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Madras Hindu Religious Endowments Act (XX of 1863)—Regulation VII of 1817—Powers of a Devasthanam Committee—Resolution of the Committee directing delivery of key of the temple safes to and defining the duties of the office of Overseer—Dharmakarthas whether would be committing breach of trust by sharing responsibility with a third person appointed by the Committee —Not ultra vires *the powers of the Committee to give directions within confines of their statutory powers.*

It has been recognised that it is open to the Devasthanam Committee in the exercise of their powers under Act XX of 1863, which still remains in force so far as the City of Madras is concerned, to take all steps which may seem to them reasonably necessary for the preservation of the properties of a temple and that in this respect the only limitation to be imposed upon these powers is that they should not unnecessarily interfere with anything that may be described as the existing scheme of management [see *Thiruvengadatha Aiyangar* v. *Ponnappa Aiyangar,* (1914) 28 M.L.J. 209: I.L.R. 38 Mad. 1176]. All the decisions of the Madras High Court recognise that a Committee constituted under Act XX of 1863 have all the powers which the Revenue Board had under Regulation VII of 1817 and that, in general terms, their powers can be described as powers of superintendence.

Where one of the Dharmakarthas of a temple in Madras asked for an injunction restraining an incumbent to the office of Overseer peculiar to that temple, from claiming joint possession and custody of the temple jewels, gold and silver articles and other movables of the temple along with the dharmakarthas and from demanding delivery of one of the keys of the temple safes, and despite the fact that from the documentary evidence from time to time since 1800 when the Board of Revenue were controlling the temples, it was clear that there had been differences between the trustees and the overseer as to the relative scope of their duties and that there had been long interregnums when no overseer had been functioning in his office at all, the Devasthanam Committee by a resolution appointed an overseer, defined the duties of his office and gave directions to the trustees to part with a third key of the temple safes containing the valuables and precious jewels.

*C. C. C. Appeal No. 14 of 1935. 23rd November, 1936.

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Held, (1) that from documentary evidence in the case there was no justification for drawing an inference against the existence of the practice of giving custody of one of the three keys to the overseer, merely from the fact that during particular periods the overseer was unable to exercise the powers granted by the Committee.

(2) that a dharmakartha of a temple should not be identified for all purposes with a trustee in the English sense and therefore the inference should not be drawn that by the dharmakarthas being asked to share responsibility for the safe custody of the temple properties with another officer like the overseer there would be breach of trust by the trustees as such.

(3) that if a statutory body like the Devasthanam Committee acting within their powers under the statute should give direction to that effect when conceived to be in the interests of the preservation of the property of the temple, then no such theory based on the law of trusts and trustees could be held to ignore a body justified in giving those directions.

Appeal against the decree of the Court of the City Civil Judge, Madras, dated 9th day of October, 1934 and passed in Original Suit No. 1020 of 1933.

K. Rajah Aiyar and *T. R. Srinivasa Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *V. Ganapathi Aiyah* for 1 and 2 Respondents.

M. Ramachandra Pant for 3rd Respondent.

V. V. Srinivasa Aiyangar and *V. V. Ramadurai* for 4th Respondent.

The judgment of the Court was delivered by

Varada-chariar, J.

Varadachariar, J.—The suit out of which this appeal arises was instituted by the plaintiff, who was then one of the trustees of Sri Kapaleeswarar temple, Mylapore, asking for an injunction restraining the first defendant from claiming joint possession and custody of the temple jewels, gold and silver articles and other movables of the temple along with the trustees and from demanding delivery of the keys of the temple safes. The temple is admittedly one falling under S. 3 of the Madras Hindu Religious Endowments Act (XX of 1863), which still remains in force so far as the City of Madras is concerned. The first defendant holds what is known as the office of Overseer in the said temple, having been appointed thereto by the Madras Hindu Devasthanam Committee in 1931.

The documentary evidence shows that from time to time there have been difference between the trustees and the overseer as to the relative scope of their functions. Though the plaint does not in terms refer to a resolution passed by the

Devasthanam Committee in August, 1933, it is clear from paragraph 6 of the plaint that it is the arrangement brought about by that resolution that led to the institution of the suit. The point for decision practically reduces itself to this: whether the Devasthanam Committee in the exercise of their powers under Act XX of 1863 were justified in defining the duties of the first defendant's office in the terms mentioned in the said resolution. The learned City Civil Judge was of opinion that the Committee were not justified in so declaring the functions of the first defendant, that in effect the resolution of the Committee amounts to a limitation of the powers of the trustees or the promotion of the first defendant to the position of a trustee jointly with the existing trustees and that the Committee were wrong in coming to the conclusion that the overseer was entitled to a third key. He accordingly granted an injunction in the terms prayed for. Hence this appeal by the first defendant.

We may observe at the outset that instead of restricting the trial to the narrow question as above suggested, the learned City Civil Judge, apparently in view of certain incidental statements in the plaint and in the written statement, raised the first part of the first issue in very wide terms and, in various portions of his judgment, he has dealt with the suit as if he had been called upon to decide whether the first defendant was entitled to joint *management of the temple* and its properties with the trustees. It would have been better if he had restricted himself to the second part of the first issue. We prefer to restrict our judgment to that question, because there is no denying the fact that this temple has been under a kind of management not altogether common in this presidency, the institution of an overseer being peculiar to this temple. No useful purpose will be served by attempting to determine the exact status of the first defendant relatively to the trustees or by using language importing any idea of superiority or inferiority.

In the Court below, a point was raised by way of an objection to the maintainability of the suit, that as the suit was practically directed against the resolution of the Committee of August, 1933, the Committee should have been impleaded as a party to the suit. Whether the omission is fatal to the maintainability of the suit or not, there can be very little doubt

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that it would be very unsatisfactory to decide the question raised in the suit in the absence of the Committee from the record. We accordingly directed that the Committee might be impleaded as a party to this appeal and that has been done. Mr. V. V. Srinivasa Aiyangar who appeared before us on behalf of the Committee sought to raise some larger issues with reference to the scope of the powers of the Committee, in view of the terms of S. 12 of Act XX of 1863. In particular, he contended that on the true construction of S. 12 of Act XX of 1863 the members of the Committee themselves should be regarded as managers of the institution and that the Dharmakarthas, though they are ordinarily referred to as trustees, are really persons who are to carry out the directions of the Committee. Mr. T. M. Krishnaswami Aiyar who appeared for the respondents insisted that this argument is opposed to a long course of decisions in this Court. We do not think it necessary for the purpose of this case to deal with this aspect of the question either and we prefer to refrain from saying anything on it, particularly for the reason that we have been told that there is a suit pending in which this question may arise for decision.

Mr. Krishnaswami Aiyar drew our attention to certain cases which have recognised that the management of temples is *prima facie* in the dharmakarthas and that the Committee ought not to reduce them to the position of servants or interfere with the management of the internal affairs of the temple. There are also observations in some of the cases to the effect that the Committee are not entitled to exercise their powers arbitrarily. But on the other hand it has also been recognised that it is open to the Committee to take all steps which may seem to them reasonably necessary for the due preservation of the properties of the institution and that in this respect the only limitation to be imposed upon their powers is that they should not unnecessarily interfere with anything that may be described as the existing scheme of management (see *Thiruvengadatha Aiyangar* v. *Ponnappa Aiyangar*[1]). We will only add that all the decisions of this Court recognise that a Committee constituted under Act XX of 1863 have all the powers which the Revenue Board had

1. (1914) 28 M.L.J. 209: I.L.R. 38 Mad. 1176.

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under Regulation VII of 1817 and that in general terms their powers can be described as powers of superintendence.

[After tracing the history of the management of the temple from the earliest records available and discussing the evidence let in for proving the later practice with regard to the question of joint custody of the temple properties with the overseer their Lordships proceeded.]

We are not satisfied that the question of the joint custody of the keys or of the valuable properties belonging to the temple was ever in controversy in the sense that a pronouncement upon it became necessary. Seeing the very clear provisions made in the earlier documents to which we have referred, we are not prepared to assume that there must have been any such controversy and unless there is anything in the later documents definitely negativing the continuance of the practice indicated in the earlier documents, we must take it that the provisions of the earlier documents relating to the joint custody had not ceased to be operative. It is noteworthy that when the appointments of trustees and overseer to this temple came before the High Court on the Original Side in a proceeding of 1876, the Court's decree directed the Receiver to hand over custody of the temple properties and monies jointly to the two trustees and to the overseer.

The Devasthanam Committee seems to have been constituted by a notification under S. 7 of Act XX of 1863 in the year 1866. Though the proceedings books of the Committee for nearly the whole subsequent period have been filed, our attention has been drawn only to certain proceedings here and there according as the parties thought that they had some bearing upon the question at issue. It is regrettable that different opinions should have obtained at different times as to the scope of the relative functions of the dharmakarthas and the overseer, but it is perhaps not very difficult to account for that divergence. From a statement furnished to us by Mr. Krishnaswami Aiyar, it appears that between the years 1889 and 1921 the officer of overseer was allowed to remain vacant for a period of nearly 22 years two such periods of interregnum being respectively 10 years and 9 years. It is also a fact of some significance that during the greater part of this period, that is, between the years 1899 and 1924 one of the trustees of this institution was P. W. 1 a well-known citizen of

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Madras and a person who held a prominent place both in the community and also in the estimation of the public. It is therefore nothing strange that in those circumstances very little attempt was made to interfere with his discretion in the management of the affairs of the temple and on two occasions when new appointees came in to hold the office of overseer, attempts made by them to assert what they conceived to be their rights were regarded with disfavour both by P. W. 1 and by the Committee. P. W. 1 admits that Shanmuga Mudaliar who was appointed overseer in 1909 protested to the Committee against his being precluded from exercising what he conceived to be the rights of the office, but the Committee did not heed and the result was that in 1912 the Committee passed a resolution upon their reading of the previous documents. Similarly when one Umapathy Mudaliar was appointed overseer in 1921 after an interregnum of 9 years, P. W. 1 states that he resisted all attempts of the new overseer to encroach upon what P.W. 1 considered to be his powers. When the first defendant was appointed in 1931, he naturally made the same attempt. It is true that at the time he was appointed, the Committee reproduced the language of the Board's resolution of 1860 which had been communicated to the previous appointees but the 1st defendant insisted upon a fuller examination of the matter and the result was the resolution passed by the Committee in 1933 which had led to this suit.

Confining ourselves to the question of the custody of the keys and the joint custody of the temple properties, we wish to point out that even those proceedings of the Committee which have been marked as exhibits in the case refer to the fact that the safe of the temple had three keys, two of which were in the custody of the two trustees and the third was in the custody of the overseer. On two occasions when the old overseer died or resigned, reference is made in the Committee's proceedings to the key in his possession being handed over to the Committee for being given over to the successor. In a resolution dated the 11th March, 1888, there is a specific direction that the room containing treasury, jewels and documents should be locked *as usual* with three keys and each of them should remain in the hands of the two dharmakarthas and of the overseer. This resolution of 1888 seems to us of special significance because the practice there stated is said to be the

usual practice; and reading the resolution in the light of the directions contained in the High Court's judgment of 1876, it rather suggests that during such time as there was an overseer holding office, nobody thought it improper or contrary to the usage of the institution that one of the keys of the temple treasury and jewel safe should be in charge of the overseer.

Mr. Krishnaswami Aiyar suggested that probably about this time the members of the Committee were trying to reduce the dharmakarthas to a position of subordination and relied upon some observations of Sadasiva Aiyar, J., in certain cases referring to the same tendency obtaining in some places. But the papers before us do not afford any warrant for the suggestion that this Committee was making any such improper attempt. Mr. Krishnaswami Aiyar placed great reliance upon the evidence of P.W. 1 as to the practice that obtained during his tenure of office between 1899 and 1924. As we have already pointed out, for a considerable portion of that period no overseer had been appointed at all and during occasions when an overseer was in office, P.W. 1 frankly admits that the overseer did attempt to assert his rights but the attempts did not avail. The failure is no doubt a circumstance in favour of the plaintiff's case, but having regard to the other evidence in the case, we do not feel justified in drawing an inference against the existence of the practice merely from the fact that during this particular period the overseer was not able to exercise those powers.

A further contention was advanced before us on behalf of the plaintiff that it would be practically compelling a breach of trust by the trustees if the dharmakarthas should be asked to share responsibility for the safe custody of the temple properties with another officer like the first defendant. This contention rests partly upon a misapprehension of the position of a dharmakartha, identifying him for all purposes with a trustee in the English sense. Apart from that, if a statutory body like the Devasthanam Committee acting within their powers under the Statute should give a direction to that effect, we do not think that merely on a general argument based upon the law of trusts and trustees we should hold that the statutory body was not justified in giving these directions; and there can be very little doubt in this case that the direction was one given or conceived to be in the interests of the *preservation* of the

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property of the temple. The case in *Salway* v. *Salway*[1] is not by any means analogous. There, a person who wanted to become a Receiver attempted to find sureties for securing this appointment and for that purpose he agreed with them that he would submit to all monies being invested in the names of himself and the sureties. The Court pointed out that the sureties were not persons who were responsible to the Court for the safe custody of the money and that the Receiver would not be excused from the due discharge of his duties merely because he had no time to get the concurrence of the sureties before drawing the monies from a bank when it was about to fail. Here, the overseer is as much an officer appointed by the Devasthanam Committee under its statutory powers as the trustees and if the proper authority lays down certain functions as the proper functions of each office-holder, we see no legal objection to its so doing. On the other hand, the principle of the decision in *Thiruvengadatha Aiyangar* v. *Ponnappa Aiyangar*[2] to which we have already referred indicates the contrary because the learned Judges there lay down that it is within the powers of the Committee even to appoint *additional* trustees, without bringing any charges against the existing trustees.

We have already stated what we consider to be the true interpretation of Ex. D. But, even assuming for the sake of argument that Ex. D exhaustively specified what the Board thought to be the functions of the office, we see no reason to hold that it is not within the competence of the Committee which has succeeded to the powers of the Board to lay down what it considers to be the proper duties of the office, in view of the information gatherable from the records. The learned City Civil Judge has used somewhat strong language in more places than one in dealing with the conduct of the Committee. We do not find anything to warrant such characterisation.

The result is that the appeal is allowed and the suit dismissed with costs of the first respondent both here and in the Court below payable by the plaintiff. So far as the Committee are concerned they have been impleaded at our suggestion as parties to the appeal as we thought it proper that they should be before us. We therefore direct that the costs

1. (1831) 2 Russ. & M. 215: 39 E.R. 376.
2. (1914) 28 M.L.J. 209: I.L.R. 3· Mad. 1176.

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incurred by them in appearing before us will be paid to them out of the temple funds. As regards costs, if any, incurred by the Receivers in connection with this appeal, we prefer not to say anything, because we consider the Receivers to be only *pro forma* parties and have not heard any separate argument on their behalf; the Court which appointed the Receivers will decide what the proper course will be in relation to the expenses incurred by them in this connection.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE VARADACHARIAR.

Bhavanam Nagireddi and others .. *Petitioners** (*Petitioners in both*)

v.

The Board of Commissioners for Hindu Religious Endowments, Madras .. *Respondent* (*Respondent in both*).

Nagireddi *v.* Board of Commissioners for H. R. E., Madras.

Madras Hindu Religious Endowments Act (II of 1927), Ss. 9 (2) and 84—'Temple'—Definition of—Public, meaning of—Affidavits filed before Board—Court, if can act upon them in the absence of deponents being examined.

Reference to public in S. 9 (2) of the Hindu Religious Endowments Act signifies only such public as is available in the locality. Where a trust deed in regard to a temple contemplates *kainkaryams* in the temple being undertaken by outsiders and provides for the performance of *Paksha Utsavam, Masa Utsavam,* etc., and the fact that the deity is taken in public procession at least once a year, are all consistent with the temple being a public one instead of a private one.

The Court acting under S. 84 can act on the affidavits filed during the proceedings before the Board even though the deponents of the affidavits are not called. The failure to examine them only affects the value of such evidence.

So long as there is no intention to exclude the right of worship, the restriction of the right of outsiders to interfere in the management of the temple is not a determining fact in deciding whether it is a temple as defined in the Act.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the District Court of Guntur, dated 26th March, 1935 and made in O.P. No. 139 of 1934 and petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to admit in evidence the document

* C.R.P. No. 1165 of 1935 and C.M.P. No. 3098 of 1936. — 6th August, 1937.

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filed therewith and marked as Ex. A in the said C.R.P. No. 1165 of 1935 on the file of the High Court.

V. Rangachari for Petitioners.

P. V. Rajamannar and *K. Subba Rao* for Respondent.

The Court delivered the following

JUDGMENT.—This petition arises out of an application under S. 84 of the Madras Hindu Religious Endowments Act. The Board had held the temple in question to be a "temple" within the meaning of the Act; the petitioners contended before the lower Court and contended before me that the requisites of the definition of a "temple" as given in S. 9 (2) of the Act are not satisfied in the present case.

I cannot ignore the fact that this Court can deal with the matter only subject to the limitations laid down in S. 115, Civil Procedure Code. The learned District Judge cannot be said to have ignored the terms of the definition in the Act, because his order winds up with the very terms employed in that definition. If I were satisfied that on any of the considerations on which his judgment is based he had fallen into such a serious error that it could be said to have fundamentally misled him in dealing with the question, I might perhaps have been disposed to interfere even under S. 115. But far from being so satisfied, I think that there are one or two considerations not adverted to by him which rather go to support his conclusion. For instance, the trust deed Ex. A clearly contemplates *kainkaryams* in the temple in question being undertaken by outsiders. It is difficult to reconcile this with the idea that the founders did not contemplate worship in the temple by persons unconnected with their family. I am not able to agree with the petitioners' learned Counsel that the clause referring to *kainkaryams* leaves it to the discretion of the trustees to permit the *kainkaryams* to be done or not. What is left to their discretion by that clause is merely the nature and extent of the honours to be shown to the persons who perform such *kainkaryams.* I cannot also help thinking that the provision in the document for the performance of what is familiarly known as *Paksha Utsavam, Masa Utsavam,* etc., is much more consistent with the institution being intended to be a public one than with its being a private institution. The admitted fact that the Utsava deity is taken in public procession at least once a year is confirmatory of the idea that the

founders were anxious to give all facilities to the public to worship the deity. It is true that there is not any positive evidence as to many outsiders coming and worshipping at this temple. That is partly explained by the fact that most of the residents in the village are Christians and the Hindu inhabitants are very few. But in a matter of this sort the reference to the public can only signify such public as is available in the locality.

Mr. Rangachari took objection to the learned Judge having acted on the affidavits filed during the proceedings before the Board in proof of the practice of outsiders to come and worship at this temple. He contended that as no evidence on that point had been led by the Board in the course of the trial before the Judge, the Court ought not to have acted upon the affidavits. I cannot agree that that is the proper interpretation of S. 84. It is true that the proceedings before the District Court under S. 84 have been held not to be merely in the nature of an appeal so as to preclude the parties from leading fresh evidence before the Court; but that is very different from saying that the proceedings before the Court are so wholly *de novo* that the materials placed before the Board should not be regarded as part of the record of the enquiry. The fact that the evidence before the Board consisted only of affidavits of persons whom the Board did not choose to examine before the Court may be a very important circumstance to be borne in mind by the lower Court in appraising the value of such evidence; but it is too much to say that the materials that were before the Board should be treated as not forming part of the record of the enquiry before the Court.

Reliance was also placed by the petitioner's learned Counsel on a clause in the trust deed prohibiting interference by anybody with the management by the founders. The learned Counsel for the Board asked me to read this prohibition in the light of the context as limited only to interference by the members of the particular family referred to in other portions of the document, namely, Yangalareddi Busi Reddi and he suggested that the expression "none else" had been used there merely to emphasise the anxiety of the founders to exclude any member or descendant of that branch. This may be a possible reading; but even taking it that the prohibition was intended to be wider, I do not think that the

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exclusion of other members from interference with the *management* will take away the institution from the definition of "temple" in the Act. The power of interference by the Court or by the legislature rests not upon the wishes of the founder but upon principles and provisions of the law. So long as there was no intention to exclude the right of worship —on the other hand, as I have endeavoured to show, it was expected that outsiders may worship in the temple and even perform *kainkaryams*—the restriction of the right of outsiders to interfere in the management of the temple is not a determining fact for the present purpose.

I quite sympathise with the apprehensions of the petitioners, who have undoubtedly spent their property in founding this institution and interested themselves in its maintenance, that the declaration made by the Board under S. 84 may at some time prejudice their rights in the institution. I can only express the hope that the Board will respect their sentiments and may not find any necessity or occasion to interfere with their customary rights or rights of management; but such considerations will not justify my holding that the order of the Board or the order of the Court below is not warranted by law. The Revision Petition is accordingly dismissed with costs.

In the view I have expressed above, it is not necessary to pass an affirmative order on C.M.P. No. 3098 of 1936. The document sought to be adduced in evidence through that petition only serves to explain how a particular item of property mentioned in the trust deed came to stand in the name of one Bapiah. That circumstance does not seem to me of much importance. I accordingly dismiss the petition.

S. V. V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

P. Amaldoss .. *Petitioner** (*Counter-Petitioner*)

v.

Mrs. Kamala Amaldoss .. *Respondent* (*Petitioner*).

Amaldoss *v.* Mrs. Kamala Amaldoss.

Criminal Procedure Code (V of 1898), S. 488—If applies to claim for conjugal rights—Wife, if can exact a promise of fidelity before returning to husband.

* Cr. R. C. No. 739 of 1936. (Cr. R. P. No. 688 of 1936). 28th July, 1937.

Amaldoss *v.* Mrs. Kamala Amaldoss.

A wife cannot exact a promise of sexual fidelity before she returns to live with her husband. S. 488, Criminal Procedure Code, has nothing to do with conjugal rights.

Arunachala Asari v. *Anandayammal*, (1933) 65 M.L.J. 386: I.L.R. 56 Mad. 913, followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Special Honorary Presidency Magistrate (Single Bench), George Town, Madras, dated 15th September, 1936 and made in M. P. No. 249 of 1936.

T. K. Rajagopalan for *N. Kasturiranga Aiyangar* for Petitioner.

Respondent neither appeared by pleader nor in person.

The Court made the following

ORDER.—This Revision Petition is not opposed. The wife's claim to maintenance is not a very strong one. She has waited three years to claim it. The petitioner now offers to take her back. She refuses to go unless he will give up his mistress. Petitioner's case is that Sundari is not his mistress, but the learned Magistrate believes that she is and that he will not desert her. The main point however seems to be that petitioner has never so far insulted his wife as to compel her to live in the same house as his mistress nor does it seem likely that petitioner will now adopt this course of conduct. If he does respondent may justifiably leave him and again claim maintenance. But I am not in agreement with the learned Magistrate that the respondent can exact a promise of sexual fidelity before she returns to live with the petitioner. In *Arunachala Asari* v. *Anandayammal*[1], my learned brother Burn, J., has held that S. 488, Code of Criminal Procedure, has nothing to do with conjugal rights; and although that case deals with Hindus there is no reason why its principles should not be extended to the case of Indian Christians. I accordingly allow the petition and quash the order for maintenance.

S. V. V. ——— *Petition allowed.*

1. (1933) 65 M.L.J. 386: I.L.R. 56 Mad. 913.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE HORWILL.

The Public Prosecutor .. *Appellant**

v.

Koramutla Narasigadu and others .. *Respondents (Accused 1 to 3).*

Public Prosecutor *v.* Narasigadu.

Indian Penal Code (XLV of 1860), S. 34—Death caused by stick—The stick not such as to cause death except by use of more than ordinary force—Three persons dealing blows—No evidence as to which of them dealt the fatal blow—All three liable only for grievous hurt.

Where three persons rushed out of a house and attacked P.W. 2, beating him severely with sticks and when his sister remonstrated they turned from him and attacked her, each delivering a blow on her head with considerable force with the sticks they held in their hands, and one of those blows fractured her skull extensively, causing a piece of bone to be pressed downwards on the brain, which led to her death by compression of the brain, but it was not clear which of the accused delivered the fatal blow.

Held, that if there had been other evidence of the intention of the accused or if the nature of the weapons used proved that all the three assailants must have intended to have caused an injury which would have in the ordinary course of nature led to the death of the deceased, then all the three persons would be guilty of murder. But as here the weapon used is not such as to cause a fracture except when more than ordinary force is used, and it is not clear as to who dealt the fatal blow, all the three can be convicted only of the lesser offence under S. 326, Indian Penal Code.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal under S. 302, Indian Penal Code, of the aforesaid respondents (accused) by the Sessions Judge of the Cuddappah Division in Sessions Case No. 28 of 1931 on his file.

A. Narasimha Aiyar for Appellant.

B. V. Ramanarasu for Respondents.

The judgment of the Court was delivered by

Horwill, J.

Horwill, J.—This is an appeal by the Crown against the acquittal by the Sessions Judge of Cuddappa of the three accused on a charge of murder, the Sessions Judge having found them guilty under S. 326 only.

The events which brought about the killing of the deceased are simple. The brinjals of P.W. 2 were rooted up and his plough stolen. He made a complaint about this, and the

* Cr. App. No. 3 of 1937. 18th March, 1937.

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accused, rightly or wrongly, thought that P.W. 2 had thrown suspicion on them. On his way home on the day of offence while he was passing the house of the accused, they abused him. He consulted some of his castemen about this abuse, and decided to refer the matter to the elders of the caste. The accused apparently heard what was going on and knew of the decision. As P.W. 2 passed their house again on his way to the house of the elders, the three accused rushed out of the house and attacked him, beating him severely with sticks. The deceased sister, hearing her brother's cries, came to the scene and asked the accused why they were beating her brother. They then turned from him and attacked her, each delivering a blow on her head with considerable force with the sticks they held in their hands. One of these blows fractured her skull very extensively, causing a piece of bone to be pressed downwards on the brain. This led to death by compression of the brain.

The learned Sessions Judge had no doubts at all about the truth of the prosecution case, nor have we. In considering the question as to what offence was actually committed by the accused, the learned Sessions Judge says:

"I do not consider that there was any definite intention by selecting the head for attack to cause her injuries of a particular kind. As against Nagi (the deceased) the accused had no motive whatsoever, whatever their feeling against Rosigadu (P.W. 2) might have been. It was therefore a case of merely voluntarily causing bodily injury which unfortunately proved to be fatal".

He then says that no doubt the accused used dangerous weapons, the sticks being 1½" to 2" in diameter. He says that the hurt was rendered grievous on account of the fracture of the skull bone and he found that the accused were guilty of voluntarily causing grievous hurt with a dangerous weapon. The first sentence of the learned Sessions Judge above quoted is quite unacceptable. It is most unlikely that when the accused struck the deceased on the head they intended to strike her elsewhere and none of them could have been ignorant of the probable consequences of the acts. Having found that the accused had voluntarily caused grievous hurt, the learned Sessions Judge really found for the prosecution most of the ingredients necessary for the offence of murder. Voluntarily causing grievous hurt is defined in S. 322 as

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follows:

" Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he caused is grievous hurt, is said, 'voluntarily to cause grievous hurt'."

Now, if the assailant causing any grievous hurt intended to cause that grievous hurt, then undoubtedly under S. 300 (3), he would be guilty of murder; for under the words of that sub-section, he would have intended to cause bodily injury and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. The doctor has spoken on this point, and has said a fracture of this kind would be sufficient in the ordinary course of nature to cause death. A person can however be guilty of voluntarily causing grievous hurt who does not *intend* to cause grievous hurt but only knows himself *likely* to cause grievous hurt; and it would appear that if he did not intend to cause grievous hurt but only knew himself likely to cause grievous hurt, it would probably not fall under any of the clauses of S. 300, and so would not be murder. However, a person is considered to intend the probable consequences of his act, and a person who hits another on the head with such force as to cause a complicated fracture of the kind actually caused here, must be considered to have intended to cause such bodily injury as would in the ordinary course of nature cause death. If therefore it were clear from the evidence who had delivered the fatal blow, that accused would in our opinion have been guilty of murder.

We do not, however, know, and no suggestion has been made, which of the three accused delivered the fatal blow. In order that all the three persons could be found guilty of an offence committed only by one of them, it is necessary under S. 34 that they should have acted in furtherance of a common intention. If there had been other evidence of the intention of the accused or if the nature of the weapons used proved that all the three assailants must have intended to have caused an injury, which would have in the ordinary course of nature led to the death of the deceased, then all the three persons would be guilty of murder. But the weapons used in this case do not seem to have been of such a size and weight that a blow given with moderate force would ordinarily cause a fracture of the skull. It is not at all improbable that something more than ordinary force was necessary, with the weapons actually

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used, to cause such a severe injury; and we therefore find it difficult to hold that the two persons who did not cause any fracture of the skull had the same intention as the person who used greater force and did fracture the skull. While therefore one person was guilty of murder and two of a lesser offence, we do not know which accused committed murder and which the lesser offence. We are therefore compelled, although for very different reasons from those given by the learned Sessions Judge, to hold that none of the accused could have been found guilty of murder.

The appeal is consequently dismissed.

S. V. V. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD THANKERTON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Syed Ali Zamin .. *Appellant**

v.

Syed Akbar Ali Khan *alias* Syed Chhotey Nawab, since deceased, and others .. *Respondents.*

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Syed Ali Zamin *v.* Syed Akbar Ali Khan.

Mahomedan Law—Shia School—Wakf—Need for delivery of possession—Executant of wakf divesting himself of all interest—Individual possession as owner converted into joint possession with other mutawallis—Separate account opened—Failure to obtain mutation—Personal use of trust funds—Inference—Valid wakf whether constituted.

Under the Shiah law a wakf does not become perfect or obligatory by a mere declaration of the settlor. It is necessary for the validity of the wakf that there should be delivery of actual possession by the wakif himself of the appropriated property to the mutawalli or to the person appointed as superintendent of the wakf property. Where the settlor is himself the mutawalli this requirement will be satisfied if it be held proved that the settlor changed the character of his possession, continuing to hold the property not as malik of the property but as mutawalli of the wakf. In such cases mutation of names is not the only method by which possession can be given or altered.

Where it was shown that the settlor had done what was necessary to change the character of his possession of the wakf property, by transferring possession from himself as malik to himself and certain others as mutawallis, and a separate account was opened by him in the name of the wakf, and his circumstances disclosed that the settlement was not made with the object of delaying or defeating his creditors, but at the same time the evidence disclosed that certain items of the property were not recorded formally in

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* P.C. Appeal No. 68 of 1930.
Patna Appeal No. 47 of 1923.

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the new names, and that the settlor utilised the available assets of the wakf for his personal needs,

Held, that the wakfnama passed the tests laid down by law, first the settlor retained no interest to himself in the properties conveyed, and secondly he had transferred the possession from himself as malik to himself and certain other persons as mutawallis, and that consequently a valid wakf came into existence.

Dictum of Mahmood, J., in *Agha Ali Khan* v. *Altaf Hasan Khan*, (1892) I.L.R. 14 All. 429 at 455 (F.B.), approved.

Mohammad Abdul Ghani Khan v. *Fakhr Jahan Begam*, (1922) 43 M.L.J. 453: L.R. 49 I.A. 195: I.L.R. 44 All. 301 (P.C.) and *Abadi Begum* v. *Kaniz Zainab*, (1926) 52 M.L.J. 430: L.R. 54 I.A. 33: I.L.R. 6 Pat. 259 (P.C.), considered.

Decision of the Patna High Court in *Syed Ali Zamin* v. *Syed Muhammad Akbar Ali Khan*, (1928) I.L.R. 7 Pat. 426, reversed.

Appeal from a decree of the High Court of Patna dated 16th January, 1928, which modified and in part reversed a decree of the Subordinate Judge of Patna dated 31st July, 1922.

The facts of the case and the circumstances leading to the Appeal to the Privy Council appear in the judgment of their Lordships, and in the judgment of the High Court (Dawson Miller, C. J. and Adami, J.) in *Syed Ali Zamin* v. *Syed Muhammad Akbar Ali Khan*[1].

Sir Herbert Cunliffe, K.C., Abdul Majid and *Mrs. M. J. Clark* for Appellant.

De Gruyther, K.C. and *Wallach* for 1st Respondent.

26th February, 1937. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—The sole question in this appeal is whether a wakfnama, dated 25th May, 1917, is valid and operative according to Shia law. The settlor was the late Nawab Haji Syed Nawab Mehdi Husain Khan, commonly known as Badshah Nawab. The suit was brought on the 9th January, 1920, in the Court of the Subordinate Judge at Patna by the respondent, Syed Akbar Ali Khan *alias* Syed Chhotey Nawab, one of the two surviving brothers of the settlor. The main though not the sole purpose of the suit was to obtain a declaration that the deed of 25th May, 1917, was invalid, and did not in law operate as a dedication of the properties comprised therein, and that, notwithstanding the deed, the plaintiff was entitled to possession of a third share of the

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1. (1928) I.L.R. 7 Pat. 426.

properties by inheritance from his brother the settlor, who had died on 19th March, 1919. The appellant before their Lordships is Syed Ali Zamin who was the first defendant in the suit; by the terms of the deed he was appointed to be sole mutwalli on the death of the settlor. The other causes of action, and the other defendants need not now be detailed. The Subordinate Judge on 31st July, 1922, decreed the suit declaring the deed to be inoperative and the properties therein mentioned to be part and parcel of the estate which Badshah Nawab left at his death. On appeal this decree was, in certain respects, modified by the decree of the High Court at Patna, dated 16th January, 1928. But on the main question, namely, the invalidity of the deed, the learned Judges of the High Court, Dawson Miller, C.J. and Adami, J., concurred in the conclusion reached by the Subordinate Judge though not in all his reasons.

In 1917 Badshah Nawab was about 60 years of age; he had a wife living (the second defendant in this suit), but he had no sons or daughters. His family had for long enjoyed the advantages of wealth and position, and his father had created a verbal wakf of three villages in Patna yielding an income of between Rs. 2,000 and Rs. 3,000 of which Badshah Nawab, after his father's death, was the mutwalli. This had provided for certain religious ceremonies in a mosque and imambara and Badshah Nawab had before 1917 been in the habit of adding money of his own to the income of his father's endowment for conducting the ceremonies. Since 1911 Badshah Nawab had suffered from paralysis, his second attack (in 1914) having impaired his ability to transact business of any difficulty: the third and last attack was in December, 1918, two or three months before his death. In 1915 he found it necessary to sell property in order to meet his debts. A banking business in which he was a partner had failed, involving him in heavy liability. With the help of the appellant, Ali Zamin, whom he called in to help him in managing his affairs, by borrowing money on mortgage and by the sale of properties he had dealt with the position and at the date of his death though he owed about Rs. 74,000, he was not insolvent even if the dedicated properties be disregarded.

The wakfnama now in dispute is an elaborate document and the schedules thereof specify a large number of properties.

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movable and immovable, with full details of the latter. The description of the objects upon which the settlor's bounty is to be expended and of the sums of money to be appropriated to each, is careful and lengthy. The net income from the dedicated properties is stated in the deed to be just under Rs. 20,000 per annum; according to the High Court the properties comprised in the deed are, substantially speaking, the whole of the unincumbered property which the settlor at that time possessed. The learned Chief Justice has given a short description of the nature and effect of the deed as follows:—

"The properties dedicated by the settlor are situated in the districts of Shahabad, Patna, Monghyr and Purnea and included his two houses known as Badshah Manzil and Badshah Mahal together with the effects and jewellery therein which were valuable. The former was to be the residence of the mutwali and the latter the residence of his wife who was also to receive during her lifetime Rs. 3,600 per annum out of the income of the endowed properties. The mutwali was to receive Rs. 3,000 per annum and two other annuitants Rs. 1,200 and Rs. 360 respectively. The municipal taxes and repairs of the houses are estimated at Rs. 1,872 and the auditors' fee at Rs. 312. Rs. 2,288 were to be spent in celebrating religious ceremonies (majlises and mahafils), Rs. 624 were to be spent on an orphanage, Rs. 468 on the burial of the dead, Rs. 312 in connection with a mausoleum, Rs. 104 for breakfasts in Ramzan and Rs. 728 on the upkeep of horses and camels for religious processions. About Rs. 1,600 were to be spent on leaders of the prayers and servants of the mosque and imambara and the balance, about one-seventh on the whole, was to go to reserve fund, to be dealt with as provided in the deed in buying further property. The settlor was to be the first mutwali and was to be succeeded on his death by Ali Zamin. A managing committee was to be appointed to come into existence after his death with certain powers of control and the right of appointing and dismissing future mutwallis. The wife's annuity after her death was to be spent on the maintenance and education of orphans and widows and any large accumulations in the reserve fund were to go in acquiring immovable properties to be treated as part of the wakf".

The appellant Ali Zamin was during the settlor's life to be co-mutwalli with him, but only nominally as the right of management was to be in the settlor. Cls. 1, 7 and 8 of the regulations laid down by the settlor for the management of the wakf are as follows:—

"1. During my lifetime, the Tauliat of the entire wakf properties, noted in schedules Nos. 1 and 2, shall have concern with me personally. During my lifetime, I shall keep the entire wakf properties in my possession and under my management as mutawali and carry out the Tauliat work. During my lifetime, no one shall have absolutely any power to interfere with and raise an objection regarding the right of Tauliat or the management of the properties. I, the mutwalli too shall spend (money) in whatever manner I would like.

"7. In order to bring this wakfnama into force it will be incumbent upon me to get my name removed as a proprietor and to get it registered in

the Government office as a mutwalli of the wakf properties specified in schedule No. 1. Similarly the future mutwallis also shall do the same.

"8. Should any mutawalli, besides myself, give up the Isna—Ashari sects of the Shia school or prove dishonest, the committee shall have power to remove him and to select another mutawalli, according to the terms of this wakfnama".

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The first respondent by his plaint did not sue as a creditor of the settlor making a case that the wakfnama was a transfer executed with the intention to defeat and delay creditors and thus voidable under S. 53 of the Transfer of Property Act or the well-known principles therein embodied. In fact no creditor appears at any time to have sought to impeach the deed. The plaint attacked the deed upon a number of grounds: that the settlor was not of sound disposing mind; that he executed the deed under undue influence by the appellant Ali Zamin who desired the office of mutwalli; that no valid wakf could be made of movables; and that the dedication was illusory in the sense that the settlor intended to use the income of the properties as he pleased and to continue throughout his life to spend the income as he had done in the past. Most of these contentions were accepted by the Subordinate Judge, who held, in particular, that the wakf was illusory, never having been intended to operate; that it was executed under undue influence and was a cloak to secure benefits for the appellant and the settlor's widow. The High Court disagreed with the Subordinate Judge upon the question of undue influence and before them the case that the settlor was not of sound disposing mind was abandoned. They disagreed also with the contention that by the deed in the clauses which have been already quoted, the settlor was given power to do whatever he liked with the dedicated property, so that he really retained, during his lifetime, his original proprietary interest. They held, as their Lordships think rightly, that on a true construction of these clauses the powers given to the settlor are the powers of a mutwalli and nothing more. But the High Court held the deed to be invalid by reason that the manner in which Badshah Nawab in fact dealt with the property after the dedication was proof that he never had any real intention of completely divesting himself of the proprietary rights during his lifetime. In the view of the High Court the settlor continued to retain possession as proprietor and to appropriate the bulk of the net profits to his own use; they

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held, accordingly, that the dedication did not comply with the requirements of the Shia law.

In Baillie's Digest of Mohummadan Law, 1869, Part II, p. 218, the Shia law as laid down in the Suraya (Shuraya-ool-Islam) "the most authoritative work of that school" (per Sir Arthur Wilson in *Baqar Ali Khan's* case[1]) is given as follows:—

"Conditions that relate to the *wukf* itself which are four in number. First it must be perpetual; second absolute and unconditional; third possession must be given of the *mowkoof* or thing appropriated, and fourth it must be entirely taken out of the wakif or appropriator himself".

In *Agha Ali Khan* v. *Altaf Hasan Khan*[2] and in *Abadi Begum* v. *Kaniz Zainab*[3], this has been quoted and applied. In the former case the third of these conditions was expounded by Mahmood, J. (p. 455) as flowing from the fact that the Shia law recognises wakf, not as an unilateral disposition of property as does the Sunni law, but as partaking of the character of a contract, at least in so far as to involve acceptance as well as offer. The most immediate application of this principle is the necessity of delivery of actual possession by the wakif himself of the appropriated property to the mutwalli or the person appointed as superintendent of the wakf property (p. 457). In other words the wakf does not become perfect or obligatory by a mere declaration of the settlor. Mahmood, J., cited ample authority for these propositions and their Lordships are clearly of opinion that under Shia law actual delivery of possession by or by direction of the wakif is a condition precedent to the wakf having validity and effect. But the same judgment contains high authority from the texts for the proposition that "an appropriator could appoint himself as the mutwalli of a wakf, and that in such a case change in the character of the possession amounts to transfer of the possession which would be required when the mutwalli appointed by the wakif is a person other than the wakif himself" (p. 479). A case is instanced as being one "in which the wakif Ali had appointed himself as mutwalli of the wakf and administered it as such thus fulfilling the requisite change in the character of possession which takes the place of actual transfer of possession when the wakif appoints another person as mutwalli". No doubt is cast upon any of these propositions by the judgment of the Board in *Baqar Ali Khan's* case[1] though

1. (1903) L.R. 30 I.A. 94 at 112: I.L.R. 25 All. 236 (P.C.).
2. (1892) I.L.R. 14 All. 429 (F.B.).
3. (1926) 52 M.L.J. 430: L.R. 54 I.A. 33 at 37: I.L.R. 6 Pat. 259 (P.C.).

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on the question of the validity under Shia law of a wakf made by will the decision was reversed.

Their Lordships, therefore, in applying the Shia law to the present case have two questions to consider, both of which have been contested at the hearing. The first is whether Badshah Nawab completely divested himself of all interest in the property which he dedicated. This, in their Lordships' judgment, is a question of construction of the terms of the wakfnama, as may indeed be seen from the illustrations given in the Suraya, as explaining the fourth condition, *e.g.*, the case of a person making a settlement on himself, or making a settlement on another with a condition to pay the settlor's debts or expenses. The matter was so regarded in *Abadi's* case[1] the question being deemed to arise on the face of the documents themselves. Agreeing as their Lordships do with the High Court that the powers given to the settlor by the wide language of the first clause, already quoted from the deed, are not more than the powers of a mutwalli to be exercised free from control by a committee of management or other such body, they are of opinion that there is nothing contrary to Shia law in the terms of the deed and that the wakf cannot be held to be invalid by reason of any failure to comply with the requirement that the settlor must divest himself of his proprietary right.

The next question for consideration is whether or not the settlor gave possession of the thing appropriated. As the settlor was to be himself the first mutwalli, this requirement will be satisfied, as has been already shown, if it be held proved that the settlor changed the character of his possession, continuing to hold the property not as malik of the property but as mutwalli of the wakf. The evidence in their Lordships' view establishes that this condition also was fulfilled. By the deed itself (cl. 7 above quoted) the settlor had indicated that by mutation of names (kharij) in Register D kept under the Land Registration Act of 1876 he would fulfil this requirement which was present to his mind; and though the steps taken by him or on his behalf may be criticised as dilatory the fact is that in the course of 1918 Badshah Nawab and Ali Zamin were registered as holding the great bulk of the zemindary properties as mutwallis under the wakfnama of

1. (1926) 52 M.L.J. 430: L.R. 54 I.A. 33 at 37: I.L.R. 6 Pat. 259 (P.C.).

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25th May, 1917. The exact dates of the various applications, and in many cases of the new entries on the Register, are not shown by the certified extracts on the record in this suit, but it is sufficiently clear that between April and August, 1918, if not from an earlier date, the settlor by his agents was engaged in effecting mutation in Patna Shahabad and Monghyr districts. Certain properties in the district of Purnea (including Dinajpur) had been included at the end of the scheduled list of dedicated properties in the wakfnama. They had been lumped together in a summary manner for purposes of description and the name Taluqa Surjapur with the names that followed it gave an ambiguous indication of the property intended to pass under the deed. The learned Chief Justice has carefully explained the difficulty and in their Lordships' view has rightly held that the property referred to included the whole of the settlor's interest in the pargana of that name and not merely his interest in twenty-nine villages. That the settlor was advised to have this ambiguity cleared up before seeking mutation in respect of the Purnea properties is in their Lordships' view established, and in fact he executed a supplemental deed on 19th February, 1919, very shortly before his death, to effect this purpose. It contains full particulars of the patni tenures which had been originally intended but imperfectly detailed as well as a correction of the Tauzi number of mausa Khajura in Monghyr. While it is true that suits for rent were in general brought in the name of Badshah Nawab as before, rent receipts given to tenants on the same printed forms as were before in use, and challans for payment of revenue, etc., made out as before, it is true on the other hand that on 4th November, 1917 ("on the Tauzi day the 5th Kartik, 1325, Fasli") an account was begun in the name of the wakf headed "annual jama karach in respect of the mahals recently given in wakf....by Badshah Nawab and Ali Zamin mutwallis" and into this account were brought the receipts from the wakf properties including properties as to which there had been no mutation of names whether in Register D or (for patnis) in the zamindar's sherista. Certain comments on this account will be considered later in this judgment. Some of the dedicated property was situated in the area of a municipality and in the strict sense no system of mutation applied to it though it was possible to get an entry made in the books kept by the municipality for purposes of tax, etc. In a partition

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suit brought in September, 1918, against Badshah Nawab and Ali Zamin as mutwallis in respect of a property in Patna municipality called Nawab Chak it was alleged by the plaint that they were so recorded, but their Lordships will take it that for municipal property no such steps were taken. It is on the other hand proved that in November, 1917, a receipt given to Mohammad Aqil for Rs. 5,100 being his collection of rents in Surjapur was given in the names of the mutwallis. Without entering further into detail their Lordships think that the broad effect of the evidence is that the settlor had done what was necessary to change the character of his possession, to give possession to the mutwallis and to discontinue his own possession as proprietor. In their Lordships' opinion mutation of names is not for the present purpose the only method by which possession can be given or altered. The observations made by Sir John Edge delivering the judgment of the Board in *Mohammad Abdul Ghani Khan* v. *Fakhr Jahan Begam*[1] are clearly against any such rule and the decision in *Abadi Begum* v. *Kaniz Zainab*[2] does not conflict with them, though in that case the importance of mutation and the significance of its absence were emphasised. In the present case the number and value of the properties as to which this most formal act of transfer of possession was carried out and the opening of a separate account in the name of the wakf are sufficient evidence that the properties comprised in the deed had been put into the possession of the mutwallis especially as there is no basis for a suggestion or suspicion that the settlor had a particular motive or desire to withhold any special item of the property. It would be to mistake the character and scope of the third condition in the passage above quoted from the Suraya, and to misinterpret it, to hold that the wakf was bad because one or two properties had not been recorded formally in the new names or because the utmost technicality had not been observed in granting rent receipts or framing plaints in rent suits.

The real basis of the decision of the High Court is to be found in the fact that an examination of the wakf jama karach discloses that, while keeping an account of the wakf receipts and of the monies taken by himself or spent on his behalf, the settlor was nevertheless using the income much as he might

1. (1922) 43 M.L.J. 453: L.R. 49 I.A. 195 at 209: I.L.R. 44 All. 301 (P.C.).
2. (1926) 52 M.L.J. 430: L.R. 54 I.A. 33 at 37: I.L.R. 6 Pat. 259 (P.C.).

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have done before the date of the deed. One striking instance may be mentioned, namely, that of Rs. 5,100 received from Mohammad Aqil as rents collected by him from Surjapur. He had been given a receipt therefor in the names of the mutwallis and the money was credited to the wakf account (19th November, 1917), but the account shows that it had been handed out at once to the settlor who had spent it at or in connection with the Sonepur fair. The account does not show that all such monies had been refunded: something had been refunded but very little. It does not show that the settlor's wife or that he himself as mutwalli was being paid the salary provided by the wakfnama. It shows expenditure on religious ceremonies but of this part, not covered by the settlor's father's wakf, was of a kind which the settlor was quite probably meeting out of his own monies prior to May, 1917. Examining this unaudited, incomplete and badly kept account for the twenty-two months which separated the wakfnama from the settlor's death the High Court made out the result as follows:—

"The total income for the full period is Rs. 38,392. This is accounted for as follows:—

	Rs.	A.	P.
Government revenue and cesses ..	9,358	0	0
Law expenses and other miscellaneous charges ..	3,909	0	0
Municipal taxes ..	1,112	0	0
Spent on the objects of the wakf deed ..	6,934	0	0
Taken by Badshah Nawab for his personal use (including Rs. 6,868 shown in the seahas from the 25th May, 1917, to the 3rd November, 1917) ..	17,000	0	0
Balance in hand on the 19th March, 1919 ..	79	0	0
Total ..	38,392	0	0

"These figures do not take account of a sum of Rs. 1,780 repaid to the wakf account from the tahvil of Badshah Nawab five days after his death. Why this amount was repaid, or by whose authority, has not been explained. In the total of Rs. 17,000 stated above to have been taken by Badshah Nawab for his personal use are included Rs. 1,549 repayment of a loan due from him to mahajans under a handnote, Rs. 50 per month paid to Ali Zamin amounting in all to Rs. 750 representing an allowance which Badshah Nawab had been in the habit of making him before the deed was executed, Rs. 133 subscription to a hospital, Rs. 173 for income-tax and various small loans to different people, but the bulk of the amount including the sum of Rs. 5,100 taken for his expenses at Sonepore is unaccounted for. It appears that Bibi Zainia was paid at the rate of Rs. 150 per month instead of Rs. 300 as provided in the deed and, as far as the accounts show, the other two annuitants were not paid anything. It may be presumed in the absence of the personal accounts that

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Bibi Zainia had some sort of allowance from her husband before the deed was executed. Although the sum of Rs. 6,934 was spent on the declared objects of the trust during the period covered by the accounts, it is admitted that Badshah Nawab had previously been performing the same kind of religious ceremonies as mutwali of his father's endowment and had supplemented the income thereof from his own resources, and it seems probable that after the new wakf deed was executed his expenditure in this respect did not appreciably increase. The accounts of the old wakf are not before us and there is no means of showing how the income derived therefrom was expended after May, 1917. It would appear therefore that the settlor to all intents and purposes continued to treat the income of the endowed properties as at his own disposal and spent the money as the deed says 'in whatever manner I would like' but whereas under the deed, as I interpret it, his choice of the mode of expenditure would be confined to the objects of the trust, in fact he spent the bulk of the available assets after payment of revenue and taxes upon his own personal needs. I am constrained to hold, agreeing with the learned Subordinate Judge, upon this part of the case, that there was never such complete divestment of interest or transfer of possession as the Shia law requires."

To this conclusion it is doubtless no sufficient answer to say that if the settlor committed breaches of trust, the trust is not thereby rendered invalid, and the settlor can be called upon to account. The settlor's intromissions with the income of the properties are part of the evidence upon which as a whole must be answered the question whether the character of his possession of the properties had been changed. Had the other evidence been less decisive this evidence might have had great importance upon the question of transfer of possession. Moreover by the contention that the wakfnama was "illusory", is meant, it would seem, that while the settlor intended it to take effect after his death, intended to transfer the possession to the mutwallis in 1918, and to come under the obligations of a mutwalli in his lifetime, yet he never intended in fact to expend the wakf income during his life upon wakf purposes but fully intended throughout to commit unlimited breaches of trust. This, of course, is an extreme interpretation to put upon the conduct of a settlor but it seems to be required for the contention that he "never had any real intention of divesting himself of the proprietary right during his lifetime." A consideration of the wakf account and of the settlor's conduct and circumstances does not, however, lead their Lordships to think that there is anything more exceptional or extraordinary in the present case than can be accounted for by attributing to the settlor loose ideas as to the duty of a mutwalli and laxity of practice at the stage which followed upon the execution of the wakfnama. The settlor was a

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Muslim of position who had for a long time contemplated founding a wakf and who was childless. He had given the utmost publicity to his wakfnama, taking pains to have it witnessed by a large number of persons both Hindus and Muslims. He may not have felt secure from all trouble with creditors but his finances were in no such state as to impel him to make a wakf to defeat or delay creditors. Still less reasonable is it to suppose that for this purpose he contemplated becoming mutwalli and then omitting altogether to carry out the terms of his own deed. The circumstance that he did not proceed to obtain mutation as if it were a matter of urgency but left this lengthy and troublesome business to be carried out in 1918 is not in any way surprising. He was in bad health and in no condition to exercise much driving power over his agents in the different districts. The purposes of his wakf included a good deal that he had been in the habit of carrying out in previous years but this does not entitle a Court of law to find that his expenditure thereon after May, 1917, was not expenditure made under the wakfnama or that he never acted upon the wakfnama. For the appellant before their Lordships it has been pointed out that against the Rs. 17,000 taken by the settlor from the wakf income a number of items may be credited to him. He was, or may at least have thought that he was, entitled to Rs. 5,500 for his own remuneration and his wife to Rs. 6,600 for the same period. He had spent Rs. 2,015 for stamp duty on the wakfnama and Rs. 452 for expenses of registration. Part of the Rs. 17,000 moreover consists of rents apportionable to a period prior to the deed. It is not in strictness true that of the expenditure upon religious objects none can be attributed unequivocably to the provisions of the deed as distinct from his previous practice. In these circumstances the wakfnama passes the tests (1) that the settlor retained no interest to himself upon a true construction of the deed, and (2) that he had before his death transferred the possession from himself as malik to himself and Ali Zamin as mutwallis, and their Lordships think that the wakf is valid at Shia law. They express no opinion as to the supplemental deed of 22nd June, 1917, but as to the mausa Kalimabad which is not comprised in the wakfnama of 25th May, 1917, the movables numbered 6, 7 and 11 and the Hupmobile car numbered 8 in schedule IV to the plaint, they think the decision of the Subordinate Judge should stand.

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The plaintiff is not upon the view taken by their Lordships entitled to any substantial relief in the suit, the contention that it is not lawful to make wakf of movables having been abandoned by his learned counsel and his claim for possession having extended only to properties now held to have been dedicated by the deed of 25th May, 1917.

In their Lordships' opinion this appeal should be allowed and the decrees of the Courts in India set aside save as regards the declaration made by the Subordinate Judge that the movables numbered 6, 7 and 11 in schedule IV of the plaint belong to the plaintiff and the declaration made by the High Court that the house No. 68, Dharamtala Street, Calcutta, belongs to defendant No. 2. There should be a further declaration that mausa Kalimabad and the Hupmobile car (item 8 of schedule IV to the plaint) are part of the assets belonging to Badshah Nawab at his death. Subject thereto the suit should be dismissed as against defendant No. 2 with costs of both Courts in India and as against the appellant with five-sixths of the costs of each Court in India and with the costs of this appeal. An application by the appellant to the Board to admit new evidence on this appeal must be dismissed with costs to the first respondent. The appellant to have leave to reimburse himself out of the wakf estate for any costs not recovered from the plaintiff. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant: *Douglas Grant & Dold.*

Solicitors for 1st Respondent: *Hy. S.L. Polak & Co.*

R. C. C. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Panchumarthi Appamma and others .. *Appellants** (*Defendants 2 to 6*)

v.

Madamanchi Bhujangarayudu and others .. *Respondents* (*Plaintiffs*).

Appamma *v.* Bhujangarayudu.

Civil Procedure Code (V of 1908), S. 92—Tope inam—Nature of—Grant to A as trustee—Produce to be applied to charity—If a public charitable trust.

* S.A. No. 631 of 1933. 22nd March, 1937.

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Where the inam register described the grant of a tope inam as a dharmadayam grant and the grantee *A* as dharmakartha and in the remarks column stated that it was "subject to the condition of the tope being preserved and the produce applied to charity" and it was in evidence that the tope was being utilised as a place of shelter for the villagers, for the cattle and for wayfarers and the produce of the tope was being distributed among the villagers, the property must be intended to have been dedicated to the use of the public and therefore a public charitable trust so as to attract the provisions of S. 92, Civil Procedure Code.

Second appeal against the decree of the District Court of Guntur in A.S. No. 22 of 1932 preferred against the decree of the Court of the Subordinate Judge of Guntur in O.S. No. 85 of 1928.

Ch. Raghava Rao and *M. Sreeramamurthi* for Appellants.

S. Ramachandran and *V. Govindarajachari* for Respondents.

The Court delivered the following

JUDGMENT.—The main point argued by Mr. Raghava Rao in this second appeal is whether the suit property can be the subject-matter of a public charitable trust so as to attract the provisions of S. 92, Civil Procedure Code. It is a tope inam consisting of 13-78 acres in the village of Paladugu. Both the Courts have taken the view that a public charitable trust was created in respect thereof and framed a scheme in regard thereto. Tope inams are a familiar class of charitable grants made by ancient rulers for the benefit of the public or a section of the public for example, the villagers of a particular locality. The date of the original grant is not known and the grant has not been produced. All that we have in this case is an extract of the fair Inam Register and the inam title issued at the time of the enfranchisement of this inam. A reference to the inam Fair Register shows that the grant was a dharmadayam grant and the grantee was a person known as Anidi Venkata Narasu who was described therein as dharmakartha. In the remarks column appears the following statement:

"Subject to the condition of the tope being preserved and the produce applied to charity."

The evidence also shows that this tope was being utilised as a place of shelter for the villagers, for the cattle and for wayfarers. Therefore, both from the nature of the grant and from the enjoyment in regard thereto, the suit property must be intended to have been dedicated to the use of the public, that is, the villagers and wayfarers who resort thereto during

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the course of their travel. It will, in my opinion, be clearly a public charitable trust and there is nothing to preclude the application of S. 92, Civil Procedure Code, to it. I find that the same view was taken with regard to a similar grant by Ramesam and Venkatasubba Rao, JJ., in Appeal No. 231 of 1926. Mr. Raghava Rao relied on a case in *Kupparazu Venkatasubbiah* v. *Murugula Shaik Silar Sahib*[1] where there was a grant to one individual subject to his performing certain duties to the public, and it was there held that the mere fact that the grantee was enjoyed to perform certain duties for the benefit of the public, would not make it a public charity. In this case it has been found that the produce of this tope was being distributed among the villagers. This negatives the idea of any beneficial ownership in any individual but tends to support the view that the grant was intended for the benefit of the public. Therefore, the view taken by the learned District Judge in paragraph 4 of his judgment seems to me to be correct, and I see no reason to differ from it.

Mr. Raghava Rao contended that the provision in scheme as framed in Appeal No. 231 of 1926 in and by which a portion of the land was allowed to be cultivated and the produce taken by the members of the family of the original dharmakartha subject to their utilising the produce for the preservation of the tope may be adopted in this case. I am not inclined to introduce any such provision in the scheme framed in this case. No doubt the nature of the original grant in this case is not known, but such enjoyment as is known seems to point to the entire village having the beneficial use of the property and not a single individual. The scheme as framed seems to be reasonable except that it requires a modification, namely, that in case the adoption of the sixth defendant is established in separate proceedings which I understand are pending he will be entitled to be a trustee along with the plaintiff and the defendants. Subject to this modification this second appeal fails and is dismissed with costs.

Leave refused.

S. V. V. —— *Appeal dismissed.*

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1. (1915) 32 I.C. 947.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE NEWSAM.

Rm. Al. Rm. Alagappa Chettiar and another .. *Appellants** *(Defendants)*

v.

Kannappa Chettiar and others .. *Respondents* *(Plaintiffs 2 to 5).*

Alagappa Chettiar *v.* Kannappa Chettiar.

Insolvency—Joint Hindu family—Father-manager of trading family adjudged insolvent—Assets of insolvent directed to be sold—Power of Official Assignee to convey sons' shares in family properties—Administration of bankrupt estates—Sale through official agency as the proper course—Secret arrangement between insolvent and purchaser—Court should refuse to countenance.

When a Hindu father-manager of a trading family is adjudicated insolvent and the Official Assignee is empowered by virtue of the composition scheme approved by the court to convey the "assets of the insolvent vested in him", the word "assets" should be taken to be sufficiently wide to embrace the father's right to bind his sons' shares for proper reasons. Even otherwise, the insolvent father's power under the Hindu law to sell the sons' share vests in the Official Assignee and in the absence of proof by the sons that the debts were immoral the Official Assignee can transfer the assets of the family to the purchasers thereof.

As regards the administration of bankrupt estates any deviation from the letter or the spirit of the Insolvency Law will open the door to fraud and profiteering. In such cases both the realisation and the distribution of the assets of the insolvent should be carried out by the official agency; and a purchaser from the Official Assignee of an insolvent's assets should never be allowed to pay creditors direct out of his purchase money. The composition between the insolvent and his creditors and the sale of the insolvent's assets by the Official Assignee are two distinct things and should be kept separate.

The Court cannot countenance a secret collusive arrangement as between the insolvents and the purchasers of their assets from the Official Assignee, by which they intend not to make all the assets of the insolvents available to the creditors, and a portion of the assets are reserved for the benefit of the insolvents or their family.

Appeal against the decree of the Court of the Subordinate Judge of Devakottai in O. S. No. 75 of 1931.

V. Ramaswami Aiyar and *M. V. Harihara Aiyar* for Appellants.

S. Parthasarathi and *V. K. Thiruvenkatachari* for Respondents.

The judgment of the Court was delivered by

Newsam, J.

Newsam, J.—The plaintiffs' suit for a declaration of their title to a house has been decreed. The two defendants appeal.

* Appeal No. 228 of 1935. 3rd August, 1937.

The relevant facts may be briefly stated as follows:—In I. P. No. 2 of 1927 on the file of the Rangoon High Court, a firm of Nattukottai Chettiars, of which the father of each defendant was a partner, was adjudicated insolvent. On 17th January, 1928, what is described as a composition scheme was approved by the Court in an order which has been exhibited as D. The terms were as follows:—The Official Assignee was to be paid his expenses and his commission; the creditors agreed to receive and were guaranteed payment of five annas in the rupee by two Chettiar firms, who were described as sureties but who were in reality purchasers of the entire assets of the insolvent firm. In pursuance of this scheme the purchasers of the assets paid Rs. 52,173-9-9 privately to certain creditors and Rs. 55,450 to the Official Assignee for distribution to the remaining creditors. These payments amounted to paying five annas in the rupee of the insolvent firm's liabilities. Thereupon by a deed of indenture dated 22nd February, 1928 (Ex. E), the Official Assignee transferred all the assets of the insolvents described in their schedule with all the *right, title and interest* of the said insolvents therein to the sureties (or rather purchasers).

On 28th September, 1929, the purchasers sold the suit house to the plaintiff (Meyappa Chetti) for Rs. 75,000.

The defendants (appellants) are the undivided sons of the insolvent partners. The chief argument developed on their behalf is that the order of the High Court, Rangoon, only empowered the Official Assignee to convey "assets of the insolvents now vested in him". The power of a Hindu father, manager of a trading family, to sell his sons' shares is not, it is argued, an asset of the insolvent father. It is an obligation of the sons to their father's creditors, it is said. On the contrary, we are of opinion that it is a pious obligation of the sons to their father, which can only be evaded by attacking the father's debts as immoral. No such attempt has been made in this case. We further think that the word "assets" is sufficiently wide to embrace the father's right to bind his sons' share for proper reasons. It undoubtedly enhances a Hindu father's credit that he is entitled to pledge his sons' shares for the good of the family business. This right is therefore an asset. The same result can be reached in another way:—Admittedly the insolvent fathers' power to sell their

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sons' share does vest in the Official Assignee. Admittedly also this power was exercised by the Official Assignee under Ex. E, for he conveyed all the right, title and interest of the insolvents. There is absolutely nothing in the order of the High Court (Ex. D) which negatived or forbade the exercise of this power. Consequently the sons' share was validly conveyed.

We overrule this contention. But before leaving this part of the case it may not be out of place to make a few general remarks on the administration of bankrupt estates. Any deviation from the letter or the spirit of Insolvency Law is calculated to open the door to fraud and profiteering. It is far from our purpose to criticize what has happened in this case but to express our views as to what ought to be done in all cases. We think that both the realization and the distribution of the assets of an insolvent should be entirely carried out by official agency. That is the only safeguard provided both for the insolvent and for his creditors. Incidentally it is the only way in which the Official Assignee can properly earn his commission. We are strongly of the opinion that a purchaser from the Official Assignee of an insolvent's assets should never be allowed to pay creditors direct out of his purchase money.

Moreover, a composition between an insolvent and his creditors and a sale of an insolvent's assets by the Official Assignee are two distinct things and should be kept distinct. When the two are combined in one hybrid transaction, the issue of the unnatural union must necessarily be of doubtful character.

We express ourselves thus strongly because, while aware of the practice which exists both here and elsewhere, we think that a stricter adherence to the underlying principles of the Insolvency Act would clarify its complexities and inspire greater confidence by reducing the opportunities for fraud and speculation in bankrupt estates.

The other point taken in appeal is that there was a secret agreement between one of the insolvents (second defendant's father) and the transferees from the Official Assignee whereby the latter, in return for the former's help in realizing assets and a cash consideration of Rs. 5,000 promised to leave each insolvent brother his house. Now this was obviously a fraudulent agreement, assuming it to be a true agreement. It is an

agreement which we cannot countenance, being a secret collusive agreement by the appellants' insolvent fathers and the purchasers of their assets from the Official Assignee not to make *all* their assets available to their creditors but to reserve something—in other words to defeat the very object of the insolvency proceedings. That is clearly against public policy, and we can only add that the very fact that such an agreement should be openly pleaded is evidence that in insolvency matters dishonesty is a commonplace.

We dismiss this appeal with costs.

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Panyam Thirumalappa .. *Appellant** (*Plaintiff*)

v.

Alasyam Ramappa and others.. *Respondents* (*Defendants*).

Partnership—Dissolution and settlement of accounts—Deed of dissolution—Non-registered—Suit by one partner for his share of immovable property—Onus to disprove title in plaintiff on defendant—Limitation Act (IX of 1908), Art. 106, whether applicable—Document whether inadmissible for want of registration.

In a suit for recovery of his one-third share in a partnership of which himself, the second defendant, and the first defendant's father were partners, plaintiff alleged that out of the funds of that business they had purchased the suit properties, that in 1909, there was a dissolution and settlement of accounts between them evidenced by a deed and that by one of its provisions the three partners had agreed that they should be entitled to the properties in equal shares. Moreover for many years after the date of the document of dissolution of partnership the plaintiff was receiving his one-third share of the income of the suit properties. Hence the plaintiff prayed for division of immovable properties held in common. The first defendant pleaded ignorance of the deed alleged to have been effected. On the question of limitation and registration decided against the plaintiff by the lower Courts,

Held, (1) that, on the question of fact, the first defendant, on whom was the onus to disprove the continuance of the title in plaintiff as evidenced by the deed, had wholly failed to discharge the burden and hence the plaintiff was entitled to the one-third share.

(2) If the deed of dissolution of partnership admittedly was a memorandum drawn upon the dissolution of the partnership, embodying the settlement between the partners as to their respective rights on settlement of the accounts of that partnership, the question of Art. 106 of the Limitation Act as barring the maintainability of the suit would never arise after that stage.

* S. A. No. 722 of 1933. 27th April, 1937.

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If on the dissolution of partnership the accounts had been settled, there was no longer any question of suit for dissolution and accounts within the meaning of Art. 106.

Gopala Chetty v. *Vijayaraghavachariar,* (1922) 43 M.L.J. 305: L.R. 49 I.A. 181: I.L.R. 45 Mad. 378 (P.C.), referred to.

Gobardhan v. *Ganeshi Lal,* (1911) 11 I.C. 288, distinguished.

(3) That the deed of dissolution was not inadmissible on the ground of want of registration.

While partners may be joint owners of the partnership property they need not necessarily be owners of equal shares. On a dissolution when the partners settle their affairs, they may either allot to one or other of them particular items in entirety or in varying shares not necessarily in the particular proportion of the share of each partner in the whole partnership property. There is much to be said in favour of the view in *Samuvier* v. *Ramasubbier,* (1931) 60 M.L.J. 527: I.L.R. 55 Mad. 72, that a question of registration may arise in such cases, though there is also authority to the contrary. If in the present case there was anything to suggest that the arrangement under the deed gave rise to the various partner's shares in immovable property being different from the shares which they held prior to the dissolution, the question of registration of Ex. A might have been a more serious difficulty in the plaintiff's way. But there has been no suggestion anywhere that during the partnership stage the partners were not entitled to equal shares and if all that happened at the time of the deed was that their respective rights and liabilities were fixed in particular ways as regards the movable assets and that as regards the immovable properties they continued to hold the same shares in them as they had prior to the dissolution, the deed cannot be rejected on the ground of non-registration.

Appeal against the decree of the District Court of Anantapur in A.S. No. 28 of 1930, preferred against the decree of the Court of the District Munsiff of Gooty in O.S. No. 353 of 1928.

Ch. Raghava Rao for Appellant.

Kasturi Seshagiri Rao for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit for the recovery of the plaintiff's one-third share in certain items of immovable property and for incidental reliefs. It is the plaintiff's case that his deceased brother Yerikalappa, the second defendant and Nettekalappa the father of the first defendant were partners in an Abkari business from 1892 to 1904, that out of the funds of that business they purchased the suit properties, that in 1904, there was a dissolution and settlement of accounts between them evidenced by Ex. A, that under that arrangement provision was made for the discharge of debts and for division of the outstandings and that as regards the immovable properties which had been purchased with the

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funds of the partnership, the three partners agreed that they should be entitled to the same in equal shares. The plaint adds that for many years after the date of Ex. A, Yerikalappa and after his death the plaintiff as his surviving brother were receiving his one-third share of the income of the suit properties. The plaint prayed for division of the immovable properties thus held in common. The first defendant, who is the principal contesting defendant, pleaded ignorance of the alleged partnership and of all that is said to have happened in 1904, though in the written statement some kind of reference is made to a dissolution 25 years ago. The positive case put forward on behalf of the first defendant was that the items now claimed by the plaintiff to be the common properties of the partners were the self-acquisitions or separate properties of the first defendant's father and the first defendant also raised pleas of limitation and adverse possession.

A number of issues were framed in the case and they were substantially decided in the plaintiff's favour by the first Court which gave him a decree for partition. On appeal, the learned District Judge reversed the trial Court's decree and dismissed the suit partly on certain grounds of law and partly on what may best be described as a mixed finding. Hence this second appeal by the plaintiff. So far as the lower appellate Court's judgment can be described as embodying a finding of fact, such finding is based on such an obviously erroneous approach to the case that I am unable to accept it as a finding binding on me.

The learned District Judge accepts the existence of the partnership alleged in the plaint and its dissolution in 1904, and also seems to agree with the trial Court's view that the items of immovable property now claimed were purchased with the funds of that partnership. Though with reference to Ex. A he makes some observations suggesting a feeling of distrust in his mind, I do not read them as throwing any doubt on the genuineness of Ex. A because the first defendant himself accepts its genuineness. What seems to have oppressed the learned Judge is that in spite of Ex. A the first defendant's father was allowed to have the properties registered in his own name during all the time that he lived, that is, up to 1918, and that he was allowed to enjoy the properties exclusively. The strongest disproof of the exclusive enjoyment or exclusive title of the first defendant's family is the admitted partition

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deed Ex. D in that family which proceeds on the footing that the family had only a *third* share in these items; and without any conceivable reason or explanation, the learned Judge brushes it aside with the remark that the recital in Ex. D that the first defendant's family was entitled only to a third share in those properties might be due to the ignorance of the first defendant as to the exact properties to which he and his father are entitled. The first defendant never pleaded ignorance and till he came into the witness-box he had never suggested that there has been any mistake in this respect in Ex. D. Even when he was put questions about Ex. D he nonchalantly pretended ignorance that there was any such statement in Ex. D. It passes my comprehension how the learned Judge when asked to consider the weight of an admission of that kind by a party could ignore it on some guess of his own without any plea or explanation by the party making the admission.

If it were necessary for the case, I should be prepared to say that Ex. D is the strongest proof that the first defendant's family must have been giving to the other two sharers their shares of the income; but it is not necessary for the purpose of the case to come to any such finding. It is sufficient to rely upon Ex. D for two purposes (1) to repel all suspicion which the learned Judge gratuitously casts on Ex. A because so late as in 1921, Ex. D asserts just the one-third right which Ex. A gave to the first defendant's family, and (2) to negative the plea of adverse possession; the first defendant candidly admits in the witness-box that he never asserted any exclusive title in himself to the knowledge of the plaintiff and in the face of the claim of a title only to one-third in Ex. D it is impossible to hold that the first defendant who was only a co-tenant could ever have proved *ouster* of the plaintiff.

The learned Judge's suspicion against Ex. A seems to have been excited by the disappearance of the later pages in Ex. A. No question has been put suggesting any particular hypothesis as to this disappearance. In the very nature of things the book could not have been in the plaintiff's custody from the outset and so long as the genuineness of Ex. A is undisputed, it seems to me immaterial for the purpose of the decision of the questions raised in this case, what happened in the course of the later business said to have been carried on in partnership between the plaintiff and the first defendant's father. If

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the first defendant had pleaded that in connection with the later partnership the rights of the parties as settled at the time of Ex. A had been changed, I can understand a comment about the disappearance of the later pages in Ex. A or the non-production of accounts relating to the later partnership. Neither in the written statement nor in his evidence did the first defendant put forward any such case. His whole case was that the property was *from the very beginning* the separate property of his father except as regards a one-third in certain items in respect of which the case as put forward through D.W. 2 was that the plaintiff's brother gave it up some time in 1901. This last story is clearly disproved by Ex. A. In this state of the pleadings, I am unable to appreciate the learned Judge's criticism against the plaintiff's case, on the ground that the Court has not been put in possession of any information as to what happened in connection with the later partnership. Neither party made these later transactions any part of the case and the plaintiff was therefore not called upon to adduce any information about what happened during that later partnership. Knowing something of the habits of the people of this country, I am unable to attach any importance to the registry in the revenue records in the first defendant's father's sole name or to the issue of patta in his name. In the face of Ex. D, these considerations seem to me very slender to base any argument upon. I have therefore no doubt that the first defendant on whom the onus should properly be laid of disproving the continuance of the title evidenced by Ex. A has wholly failed to discharge that onus and that on that ground the finding of the trial Court in plaintiff's favour on the question of title should be restored.

The learned District Judge has also decided against the plaintiff on two points of law (1) a question of limitation and (2) a point of registration. So far as the decision on the question of limitation is concerned, I am unable to accept the learned Judge's conclusion that Art. 106 is any bar to the maintainability of the present suit. In *Gopala Chetty* v. *Vijayaraghavachariar*[1] the Privy Council recognise the possibility that on a dissolution the partners may settle the accounts of the partnership between themselves. If that has been done, there is no longer any question of a suit for dissolution and

1. (1922) 43 M.L.J. 305: L.R. 49 I.A. 181: I.L.R. 45 Mad. 378 (P.C.).

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accounts within the meaning of Art. 106. That is just what happened in this case. Ex. A is admittedly a memorandum drawn up on the dissolution of the partnership and embodying the settlement between the partners as to their respective rights on settlement of the accounts of that partnership. I fail to see how any question of Art. 106 arises after that stage. The decision in *Gobardhan* v. *Ganeshi Lal*[1] cited before me by the learned Counsel for the respondent is clearly distinguishable. In that case, there had been no settlement of accounts between the partners after dissolution and the suit itself was brought as one for dissolution and taking of accounts. The Court however found that by reason of the death of one of the partners, the partnership had become dissolved in law more than three years before the institution of the suit. It was therefore obviously a case in which the accounts of a dissolved partnership had to be taken. To such a suit Art. 106 clearly applies. An attempt was then made to dissociate so much of the plaintiff's claim as related to certain items of immovable property from the bar under Art. 106. The learned Judges, if I may say so, rightly held that such a dissociation was impossible. It was not a suit governed by Art. 142 or Art. 144; the immovable properties were claimed on the very ground that they formed part of the partnership assets and where the accounts had not been taken, no Court could grant relief in respect of some items alone of the partnership without taking the accounts of the partnership as a whole. It is in those circumstances that the learned Judges observed that a right to a division of the house could not be established until after a full account had been taken of all the partnership assets and as a suit for the latter purpose was barred, it was not possible to grant any independent relief in respect of the items of immovable properties alone.

The objection under the Registration Act has caused me greater difficulty, not on the particular ground adopted by the learned District Judge but on a somewhat different ground. The learned District Judge speaks of a transfer of title from the partnership to the partners individually, as the reason for insisting upon the registration of Ex. A. That perhaps is not a correct way of putting it; because a partnership is not a legal entity like an incorporated body and during the subsistence of

1. (1911) 11 I.C. 288.

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the partnership the title to immovable properties brought into the partnership or purchased with its funds vests in the partners and not in the partnership as such. As pointed out in *Samuvier* v. *Ramasubbier*[1] it follows from the provisions of S. 253 of the Contract Act that all immovable property purchased with partnership funds must be deemed to be held by the partners as joint owners. Though Ex. A is therefore not a transfer from the partnership to the individual partners, there can be no doubt that a settlement arrived at on a dissolution might vest the immovable properties of the partnership in the former partners in proportions very different from the interests held by them during the subsistence of the partnership. S. 253 (1) of the Contract Act provides that the share of each partner in the partnership property is the value of his original contribution increased or diminished by his share of profit or loss. It would thus follow that while partners may be joint owners of the partnership property they need not necessarily be owners in equal shares. On a dissolution, when the partners, settle their affairs, they may either allot to one or other of them particular items in entirety or in varying shares not necessarily in the particular proportion of the share of each partner in the whole partnership property. There is much to be said in favour of the view taken in *Samuvier* v. *Ramasubbier*[1] that a question of registration may arise in such cases, though there is also authority to the contrary. If in the present case there was anything to suggest that the arrangement under Ex. A gave to the various partners shares in immovable property different from the shares which they held prior to the dissolution, the question of registration of Ex. A might have been a more serious difficulty in the plaintiff's way. But there has been no suggestion anywhere that during the partnership stage the partners were not entitled to equal shares and if all that happened at the time of Ex. A was that their respective rights and liabilities were fixed in particular ways as regards the movable assets and that as regards the immovable property they continued to hold the same shares in them as they had prior to the dissolution, I do not feel that I am bound to reject Ex. A on the ground on non-registration. Under S. 45 of the Transfer of Property Act, the presumption in the case of co-owners, in the absence of evidence to the

1. (1931) 60 M.L.J. 527: I.L.R. 55 Mad. 72.

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contrary, is that they held the property in equal shares and that is just what Ex. A provides for. It is on this narrow ground that I have come to the conclusion that Ex. A is not inadmissible on the ground of want of registration.

I accordingly allow the second appeal and setting aside the decree of the lower appellate Court restore the decree of the District Munsiff with costs here and in the lower appellate Court, payable by the first defendant.

Leave granted.

K. C. —— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD THANKERTON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Mahabir Prasad and another .. *Appellants**

v.

Syed Mustafa Husain and others .. *Respondents.*

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Mahabir Prasad *v.* Syed Mustafa Husain.

Mahomedan Law—Shiahs—Wakf—Oral statement—Whether amounts to will—Evidence of persons present—Distinction between wakf bil wasiyat *and* wasiyat bil wakf*—Dedication to wakf by widow and adult children of deceased —Condition that minor children also should join after attaining age—Validity of wakf—Death illness—Conveyance of entire property to wife in lieu of dower—Validity.*

The distinction between a wakf by will in the direct form or *wakf bil wasiyat* and a will by testament or *wasiyat bil wakf* is one of form and not of substance. It is between a will which conveys the property on the death of the testator to the mutawalli as wakf or at least impresses the character of wakf immediately on the testator's death and a will which makes a gift of property with a direction to the donee to create the wakf desired or gives a direction to the heir, executor, or other representative to that effect.

Agha Ali Khan v. *Altaf Hasan Khan,* (1892) I.L.R. 14 All. 429 (F.B.) and *Baqar Ali Khan* v. *Anjuman Ara Begam,* (1903) L.R. 30 I.A. 94: I.L.R. 25 All. 236 (P.C.), referred to.

Upon a question whether an oral statement amounts to a will the greatest care must be taken and strict proof must be required. The Court must be made certain that it knows what the speaker said and must from the circumstances and from the statement be able to infer for itself that testamentary effect was intended in addition to being satisfied of the content of the direction given. The question must be answered primarily upon a scrutiny of the evidence given in the case by persons present when the statement was made.

Where the immediate dedication to a wakf made by the widow and the major children of a deceased person is conditional upon the other children doing likewise when they came of age, then the dedication not being absolute is bad altogether and cannot take effect.

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* P. C. Appeal No. 80 of 1934. 19th March, 1937.

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Suraya: *Baillie's Digest of Mahomedan Law*, 1869, Part II, p. 218, relied on.

Quaere.—Whether or not it is open to a Shiah Mahomedan in spite of death illness to make a gift to his wife of the whole of his estate in lieu of dower.

Ghulam Mustafa v. *Hurmat*, (1880) I.L.R. 2 All. 854; *Abbas Ali* v. *Karim Baksh*, (1908) 13 C.W.N. 160; *Esahaq Chowdhry* v. *Abedunnessa Bibi*, (1914) I.L.R. 42 Cal. 361; Tyabji's Principles of Mahomedan Law, 2nd Edn., p. 814 and Ameer Ali's Mahomedan Law, 4th Edn., Vol. I, p. 63, referred to.

Decision of the Chief Court of Oudh reversed.

Appeal from a judgment and decree of the Chief Court of Oudh at Lucknow affirming a judgment of the Subordinate Judge.

J. M. Parikh and *R. Parikh* for Appellants.

J. M. Pringle for Respondents.

19th March, 1937. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—On the 13th April, 1918, one Mir Fida Husain, a Mussulman of the Asna-Ashari sect of the Shias died leaving him surviving a widow, six sons of whom two were minors, and three daughters of whom two were minors. The appellants are judgment creditors of three of the sons—namely, Mohammad Askari, Hasan Askari and Baqar Mehdi—who were all of full age at the date of their father's death. In execution of money decrees against these sons the appellants in 1928 attached certain of the properties left by Mir Fida Husain, in consequence whereof they were impleaded as defendants 1 and 2 in the suit out of which this appeal arises.

This suit was brought on 17th October, 1929, by two of Mir Fida Husain's daughters seeking to establish that the whole of the properties left by their father, including the properties attached by the appellants, were wakf property. The learned Subordinate Judge has held that the shares (in all thirteen-twentieths) which would ordinarily be inherited by the widow, and by the four sons and one daughter who were of age at the time of their father's death, had become wakf property; but that the remaining seven-twentieths were not included in the wakf. The Chief Court of Oudh has held in effect that the wakf extends to the whole of the property left by Mir Fida Husain, which may be taken as worth about a lac of rupees and to have produced a gross income of over Rs. 13,000 per

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annum leaving a balance, after payment of land revenue, of Rs. 7,766.

A week or ten days before his death on 13th April, 1918, Mir Fida Husain, as both Courts in India have found, made a statement, the precise effect of which is now in question. It is spoken to by five witnesses, two of whom gave evidence on commission, and three at the trial before the learned Subordinate Judge. All his heirs are said to have been present when the statement was made, but though the five witnesses include a son-in-law, a nephew and a niece, none of his children have given evidence. Three witnesses at least are of good position—a Deputy Collector, a Hakim and an Honorary Magistrate. In fact after his death—in August, 1918—Musammat Azmat-un-nisa, the widow, was, with her sons' consent, recorded by the revenue authorities as entitled for her life to the whole of her late husband's properties. Two and a half years after the death—namely, 16th December, 1920, a registered deed was entered into by the members of the family in the following terms:

Whereas it was the desire of our father, the late Mir Fida Husain, that he should make a *waqf* of his property in favour of his children so that the property be saved from being wasted and with this particular object in view, the deceased got a draft prepared but owing to illness and the severity of his maladies, he could not get an opportunity to complete the deed and therefore a few days before his death, the deceased expressed his desire to all of us, his children, and made a will to us to the effect that after his death, mutation in respect of the entire property should be got effected in favour of our mother as absolute owner in lieu of her dower debt and he directed our mother to make a *waqf* in favour of children in respect of the entire property as her own; whereas after the death of our deceased father, the mutation of names was accordingly got effected in favour of our mother; but in the application for mutation, owing to a misapprehension of our intention, some such words came to be entered as seem to show that the ownership of our mother is limited to her life only and whereas this has given rise to complaint and displeasure on the part of our mother so for the satisfaction and the removal of the complaints of our mother, and with a view to enforce the intention and will or our late father, we, the sons of the late Mir Saheb, do hereby affirm and reduce to writing that in conformity with the oral will of our late father, our mother, Musammat Azmat-un-nisa Begam, after the death of our father, has become the absolute owner of the entire assets of our late father and that we have no right in his assets. We, Musammats Amir Bano, Shabbir Bano and Safdari Bano, the daughters of the late Mir Saheb, do hereby declare and reduce to writing that under the will of our deceased father, our mother, Musammat Azmat-un-nisa Begam has become the absolute owner of his entire assets; that under custom we, the daughters, have no right to any legal share as against our aforesaid brothers nor do we wish to obtain any such right in the face of our late father's oral will and his desire and that our mother, Musammat Azmat-un-nisa Begam, is owner of the entire estate

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left by our deceased father, a detail whereof, so far as the immovable property is concerned, is given below. Wherefore these few presents have been reduced to writing by way of a deed of relinquishment so that it may serve as an authority and be of use when required.

To this deed the widow and all the children whether major or minor were made parties, the only notice taken of the disability of minors being that the eldest son signed as guardian for Asqhar the youngest. The deed denominates itself "dastbardarinama" which is translated "deed of relinquishment". There was in fact no custom to exclude daughters from inheritance. The question whether and to what extent the recitals in this deed can be relied upon as correctly representing the nature and effect of what was said by Mir Fida Husain, is an important question in the present case. The trial Judge was of opinion that the deed gives the import of what was said by Mir Fida Husain, but wrongly represents his speech as a will though it was intended only as advice to his heirs as to how they should act after his death.

On the 28th January, 1922, the widow, Musammat Azmat-un-nisa, executed a deed of wakf of which the opening recital was in these terms:

Whereas my deceased husband died leaving the following property worth about a lac of rupees and after him, according to his desire and will, the said property came into my ownership and possession in lieu of dower debt; whereas his other heirs, out of their own free will and consent, having executed a deed of relinquishment, dated 16th December, 1920, registered on 20th December, 1920, in respect of the said property, admitted my ownership and thus I am the absolute proprietor in possession of the said property and enjoy all proprietary powers with regard to the same, whereas the whole of the said property is free and immune from all sorts of transfers, like sale, mortgage, gift, etc., and I wish to make a perpetual *waqf* of the said property in favour of children in conformity with the wish and will of my husband, so that the said property, as a memorial of my late husband, having remained free and immune from all kinds of transfers, his children should, in perpetuity, be profiting from the same while a portion of the profits thereof from this very time and the entire profits, in the absence of the existence of children, should continue to be spent on charitable purposes in perpetuity, whereby I and my deceased husband should continue to be benefited from such a religious *waqf* (spiritually).

By the terms of this wakfnama, it was provided that the lady herself should be the first mutwalli; that after her the office should go to the eldest in the male line and in default to the eldest among the daughters' male issue; that Rs. 120 per annum should be paid to an old servant; that the marriage

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expenses of daughters should be met out of the income; that Rs. 560 should be spent annually on religious ceremonies; that certain specified houses should remain in the occupation of the sons and their successors; and that the produce of the lands held in khas should be divided in a certain way and on certain terms.

The main destination of the profits was that each daughter should get an allowance of Rs. 300 per annum and that the balance of the income should be divided equally among the sons for their maintenance. Upon the death of a son or daughter, his or her male issue was to get in equal shares what he or she would have received if alive. On the death of any male recipient without leaving male issue his widow and thereafter his daughters were to take his share; on failure of these it was to be divided among the other male issue of the settlor's son to whose branch he had belonged; and in default thereof was to go to the other sons of the settlor or their representatives. There was an ultimate destination of the profits, in the absence of any person entitled under the conditions of the deed, to the effect that "they shall be spent upon such educational enterprise as might benefit students of the Asna-Ashari sect".

A *wakf-alal-aulad* having thus been made of Mir Fida Husain's property, it was acted on for two years, more or less; but on 21st October, 1924, five of the sons sued the widow and the sixth brother for cancellation of the deed of wakf and partition of the property. The defendants consented, a preliminary decree for partition was passed on 13th February, 1925, and after final decree on 22nd October, 1925, the property ceased in September, 1926, to stand in the name of the widow as mutwalli, and was recorded in the names of the widow and the sons according to the shares stated in the partition decree. The daughters had been altogether ignored in this partition suit, but one of them Musammat Shabbir, unsuccessfully objected in the mutation proceedings, and filed a civil suit on the 10th September, 1926, asserting in the alternative her rights by inheritance and her rights under the wakf. This suit having been dismissed in two Courts was nevertheless still pending on appeal before the Chief Court on 7th May, 1929, when it was compromised on the basis of the validity of the wakf.

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Meanwhile the widow had died on 26th January, 1929, and certain of the sons had incurred debts secured and unsecured exceeding in all half a lac of rupees, and were in trouble with their creditors. Among other efforts to protect their rights, on 18th March, 1929, Musammat Amir, and on 11th May, 1929, her sister Musammat Shabbir, filed objections to the execution sale of certain of the properties left by their father which had been attached by Mahabir Prasad (the first of the present appellants) in execution of a decree against two of her brothers, Mohammad Askari, and Hasan Askari. The objections of both sisters were disallowed: hence the present suit.

The first question is as to the statement made by Mir Fida Husain shortly before his death and the effect thereof. Three views seem on the evidence to be possible. First, the view of the Chief Court that he made an oral testament for a wakf (*wasiyat bil wakf*). Second, the view of the trial Judge, that what he said was not intended as an oral will but was advice to his family to secure the protection of a wakf by first constituting his widow as full owner in lieu of her dower debt so that she could make a wakf. Third,—an intermediate view—that what he said amounted to an oral will purporting to give all his property to his widow in lieu of her dower, it being left to her to make her own wakf of her own property but without any attempt to impose a legal obligation so to do.

Mir Fida Husain was a practising lawyer of Rae Barelli and had studied the Wakf Validating Act (VI of 1913). The evidence is that he had intended to make a *wakf-alal-aulad* himself and there is some evidence that a draft deed had been in part prepared. Before he had completed his scheme he found himself as a Shia in the position that without the consent of his heirs he could not deal with more than one-third of his estate. The doctrine of *marz-ul-maut* (death illness) prevented his doing so by gift and the ordinary law prevented his doing so by will. Consent of the heirs (if *sui juris*) could, however, be given in the case of a will before or after the testator's death. Whether or not it was open to him in spite of death illness to make a gift to his wife of the whole of his estate in lieu of dower is a moot point [cf. *Ghulam Mustafa* v. *Hurmat*[1], *Abbas Ali* v. *Karim Baksh*[2] and *Esahaq Chowdhry* v.

1. (1880) I.L.R. 2 All. 854. 2. (1908) 13 C. W. N. 160.

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Abedunessa Bibi[1]. Ameer Ali "Mahommedan Law", 4th Ed., Vol. I, p. 63, and Tyabji "Principles of Muhammadan Law", 2nd Ed., p. 814, differ in their views]. Such a transaction, as the cases show, has been treated as a sale: in which view however a registered instrument would be necessary. It is not the case of anyone that he purported to make such a gift *inter vivos*; and as the evidence proves no such gift this possibility may be discarded. The approach of death made it necessary for Mir Fida Husain to do something and yet impossible to complete anything by his own act. In this dilemma what did he do?

Their Lordships cannot agree with the Chief Court that what he is proved to have said can be regarded as founding a wakf by will whether in the more direct form (*wakf bil wasiyat*) or, as the Chief Court thought, by testament for a wakf (*wasiyat bil wakf*). This distinction, much discussed in *Agha Ali Khan* v. *Altaf Hasan Khan*[2] and *Baqar Ali Khan* v. *Anjuman Ara Begam*[3], lost most of its importance by the decision of this Board in the latter case. The distinction is one of form and not of substance as Sir Arthur Wilson therein explained. It is between a will which conveys the property on the death of the testator to the mutwalli as wakf, or at least impresses the property with the character of wakf immediately on the testator's death, and a will which makes a gift of property with a direction to the donee to create the wakf desired, or gives a direction to the heir, executor or other representative to that effect. On the evidence it is clear that Mir Fida Husain intended the property to become vested in his widow as her own property in lieu of dower, though how he intended this result to be brought about is not so clear. This intended result is strong to negative the case of *wasiyat bil wakf* and the complete absence of detailed instructions as to the provisions of the proposed wakf, and other circumstances point firmly in the same direction. Their Lordships consider that a *wasiyat bil wakf* is not made out by the evidence.

As already noticed, the trial Judge was of opinion that Mir Fida Husain's statements were at the time of the deed of relinquishment (December, 1920) represented as amounting

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1. (1914) I.L.R. 42 Cal. 361. 2. (1892) I.L.R. 14 All. 429 (F.B.).
3. (1903) L.R. 30 I.A. 94: I.L.R. 25 All. 236 (P.C.).

to an oral will though in fact they were merely intended to point out a device whereby after his heirs had inherited in the ordinary way they should effect what he could no longer effect himself, a *wakf-alal-aulad.* Accordingly the learned Judge regarded the deeds of 16th December, 1920, and 28th January, 1922, as evidencing and carrying out an agreement made between the widow and her children with the result that it was good so far as regards the children who were of age and wholly void under the Indian Contract Act (S. 11) as regards the four who were minors.

Upon a question whether an oral statement amounted to a will the greatest care must be taken and strict proof must be required. The Court must be made certain that it knows what the speaker said and must from the circumstances and from the statement be able to infer for itself that testamentary effect was intended in addition to being satisfied of the content of the direction given. Their Lordships fully agree with the learned Trial Judge that on the question whether the statement was intended by Mir Fida Husain to have testamentary effect the deed of 16th December, 1920, is by no means conclusive. The absence of the sons from the witness box and the inconsistent conduct of so many of the heirs enforce this opinion. The question must be answered primarily upon a scrutiny of the evidence given in this case by persons present when the statement was made, and it is difficult for the plaintiffs to put their case higher than the evidence of their most cautious witness. As to the terms of the actual statement, the nephew and the niece gave evidence which if fully believed would mean that Mir Fida Husain was making an oral will, but the evidence of the Deputy Collector (son-in-law) and the Hakim which is more objective and precise does not necessarily involve any such implication. This is all the more important that Mir Fida Husain was a lawyer unlikely to have been content with an oral will, and very unlikely, if he did decide to make one, to have omitted the most elaborate expression of his intention that his words should be regarded as a solemn testamentary disposition. Their Lordships are accordingly unable to hold that the words used by Mir Fida Husain had any greater effect that the learned trial Judge was satisfied of, and the third of the views abovementioned must like the first be rejected.

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The next question for decision is whether the wakf can stand if it has to be regarded as resting upon an agreement to which the widow and the five major children were the parties, the four children who were minors being in no way bound thereby. Both Courts in India have thought that the wakf can on this footing be held valid so far as regards the shares of the widow and the major children. The question has to be answered by examining the particular provisions of the wakfnama of 28th January, 1922, and upon a scrutiny thereof their Lordships are of opinion that the wakf must fail altogether. To apply the provisions of the deed to thirteen-twentieths of the property after seven-twentieths had been taken away by partition would in their Lordships' view produce results which no one intended.

Even if it be assumed that no child whose share was not bound by the deed could take benefit under it, the provisions as to expenditure on religious ceremonies (Rs. 560) and servants pension (Rs. 120), as to particular houses and groves going to each son, and as to the office of mutwalli would be altered in their operation and effect by the absence of four out of the nine sharers and seven-twentieths of the property. This is emphasised by the fact that what each son is to take is a share in the residue of the income; and also by the fact that the motive of the parties was to carry out the wishes of Mir Fida Husain who never had envisaged a *wakf-alal-aulad* which should not include all his property and all his family. The hopelessness of the attempt to create the intended results by agreement so long as there were minor children explains no doubt the early determination, evidenced by the partition suit of 21st October, 1924, to repudiate the wakf. It must, moreover, be borne in mind that if the immediate dedication of their own shares by the widow and major children was conditional upon the other children doing likewise when they came of age, then the dedication not being absolute was bad altogether [Suraya: Baillie's Digest of Moohumudan Law, 1869, Part II, p. 218]. The result is that the suit fails and must be dismissed.

The Chief Court, on the footing that Mir Fida Husain had made a testament for a wakf (*wasiyat bil wakf*), were of opinion that two minor sons, who on coming of age had refused assent as heirs to this bequest, could change their

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minds and by assenting make valid what had been void and even sweep away securities granted by themselves. Their Lordships must not be taken to accept this opinion. It was contended that if the compromise of 7th May, 1929, made before the Chief Court in Musammat Shabbir's suit was collusive, then the decree of the District Judge confirming dismissal of her suit became binding upon her as *res judicata*, but this contention in their Lordships' opinion is erroneous. It was argued before both Courts in India that the wakfnama of 28th January, 1922, was wholly void by reason that Musammat Azmat-un-nisa had provided for herself as mutwalli an allowance of Rs. 600 per annum and for other mutwallis Rs. 300 per annum only. *Abadi Begum* v. *Kaniz Zainab*[1] was cited in support of this argument but was in their Lordships' opinion rightly distinguished by the Chief Court and the contention was not pressed at the hearing of this appeal.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decrees of both Courts in India should be set aside and the suit dismissed. The plaintiffs must pay the appellant's costs throughout but may recover one-ninth of such costs from each of the defendants 15 to 21. There will be no order as to any other costs.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondents: *Watkins* and *Hunter.*

R. C. C. *Appeal allowed.*

B. V. V.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD RUSSELL OF KILLOWEN, LORD MACMILLAN AND SIR JOHN WALLIS.

Sri Sri Iswari Bhubaneshwari Thakurani .. *Appellant**

v.

Brojo Nath Dey and others .. *Respondents.*

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Hindu Law—Religious Endowments—Deed of dedication to private idol—Provision for upkeep of worship, residence, etc.—Ultimate surplus conveyed to shebaits or family members—Effect—Possession by non-shebait to the

1. (1926) 52 M.L.J. 430: L.R. 54 I.A. 33: I.L.R. 6 Pat. 259 (P.C.).

* P. C. Appeal No. 13 of 1935. 8th April, 1937.

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exclusion of idol—Acquisition of title by prescription—Fact of joint possession with shebait member of family if relevant.

The effect of a valid deed of dedication is to place the property comprised in the endowment *extra commercium* and beyond the reach of creditors. The dedication is not invalidated by reason of the fact that members of the settlor's family are nominated as shebaits and given reasonable remuneration out of the endowment and also rights of residence in the dedicated property. The dedication moreover may be either absolute or partial. The property may be given out and out to the idol or it may be subject to a charge in favour of the idol. The purposes of the dedication may be directed to expand as the income increases, or the purposes may be prescribed in limiting terms so that if the income increases beyond what is required for the fulfilment of these purposes it may not be protected by the dedication.

A deed dedicating property to a private idol provided *inter alia* that certain property including a house was for the location of the idol and the residence of the shebaits. Other properties included in the schedule to the deed were granted to the auspicious feet of the deity as debutter, and out of their income was to be reserved sufficient money for taxes and repairs to the properties which included the Thakur Bari or place where the deity was located and the residence of the shebaits. The shebaits were then directed to have the worship performed and to feed the poor, etc. The shebaits were further directed to purchase Government securities with the surplus resulting annually after meeting prescribed expenses. When a large amount of money had thus accumulated, the shehaits were to cause tenanted houses to be built on the lands in the schedule, and give them for the convenience of residence and habitation to the grantors' heirs. The deed in question, which was executed in 1888, was repudiated by the family in 1904 whereupon the property dedicated was declared to be vested jointly in two brothers one of whom was a shebait, and they enjoyed the said property. About twenty years thereafter a suit was instituted by the then shebait claiming the entire property on behalf of the idol.

Held, that the deed effectively dedicated to the idol the property given for its location, namely, the Thakur Bari and the shebaits' residence, but that, in respect of the other properties the deed was in substance a gift in favour of the settlor's heirs generally. The destination of the ultimate surplus to be applied for providing additional premises for the benefit of the heirs showed that there was a charge upon the property for the upkeep of the idol and that the idol could not claim to have an absolute right to such property.

Held also, that the possession of the property for the statutory period without interruption had given the person who was not a shebait a title by prescription as he was in no way affected by any fiduciary disability attaching to a shebait and the fact that he was in joint possession with the shebait did not affect his right.

Appeal (No. 13 of 1935) from a judgment and decree dated 13th May, 1932, of the High Court of Judicature, Fort William (Rankin, C.J. and Costello, J.), reversing a decree of the High Court in its Ordinary Civil Jurisdiction, dated 19th December, 1930, and made by Buckland, J.

M. H. Rashid for Appellant.

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L. P. E. Pugh, L. De Gruyther, K.C., J. M. Pringle and *W. Wallach* for Respondents.

8th April, 1937. Their Lordships' judgment was delivered by

LORD MACMILLAN.—On the 5th May, 1888, Rakhal Chandra Dey, since deceased, and his brother Brojo Nath Dey, the first respondent, executed a deed of dedication of certain properties in the environs of Calcutta in favour of a female domestic Hindu deity, who, by her shebait Mohini Dey is the present appellant. On the 5th April, 1896, the same two brothers as individuals by deed of sale sold and conveyed to themselves as shebaits of the deity certain land in the district of Hooghly. The main question in the appeal relates to the efficacy of the deed of dedication of 1888.

Before proceeding to deal with this question, it is desirable to narrate certain events which intervened between the granting of the deed in 1888 and the raising of the present action. Rakhal Chandra Dey, one of the granters of the deed, died in 1901 leaving two sons, Pulin and his half-brother Satya, the latter then an infant. In 1904, in a suit brought by Satya, by his mother as his next friend, against his uncle Brojo Nath Dey and others, a consent order was pronounced setting aside the deed of dedication of 1888 and the deed of sale of 1896, ordering the properties therein comprised to be divided into two equal shares and finding Pulin and Satya jointly entitled to one moiety and Brojo Nath Dey entitled to the other moiety, with liberty to Pulin and Satya to apply for partition of their moiety between them. The final decree for partition between Pulin and Satya on the one hand and Brojo Nath Dey on the other hand was pronounced in 1906. The idol was not a party to the suit. It was submitted by eminent counsel who appeared in the case that, inasmuch as the idol was a private one, the dedication could competently be set aside by consent of all the members of the family. Authority was cited for this view and it was apparently accepted by the Court as being then good law.

In 1917 Satya came of age, and in the following year he brought a suit for partition as between himself and Pulin. In this suit Pulin, notwithstanding that he had been a party to the consent order of 1904, maintained that the properties were still debutter and subject to the dedication to the idol. A

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preliminary decree for partition was pronounced in this suit but no final decree has yet been passed. Pulin next in 1922 mortgaged his half share in certain of the properties for Rs. 28,000 to persons of the name of Roy, and in 1924 he executed a further mortgage for Rs. 25,000 in favour of some other persons named Mondal. In that year Pulin died leaving two sons Mohini and Jamini. Subsequently, in 1928, in execution of a money decree which had been obtained against Pulin in 1919, his share of the properties was sold subject to the mortgages in favour of the Roys and the Mondals, and was purchased by one Ganapati Chatterji.

The mortgagees having instituted suits for the realisation of their securities, the appellant Mohini, Pulin's son, claiming to be the shebait of the idol, retorted by raising the present action in the name of the idol claiming that the idol was entitled to all the properties comprised in the deed of dedication of 1888 and the deed of sale of 1896. The defendants to the suit include Brojo Nath Dey, Satya and the mortgagees under the mortgages granted by Pulin. Buckland, J., before whom the case came in the first instance, found in favour of the plaintiff, now the appellant, granting a declaration of her title to the properties in suit, a decree for quiet possession and consequential injunctions. This judgment was reversed on appeal, and in lieu thereof the Appeal Court (Rankin, C.J. and Costello, J.) held that the plaintiff was entitled absolutely to only one equal half share in the Thakurbari and shebait's house at 30, Beniapukur Road, Calcutta, that Satya had acquired by limitation a title to the other half of these subjects, and that as regards the other properties in suit (other than the property at 45, Elliot Road, the claim to which was given up) the plaintiff was entitled to a charge thereon "for her upkeep, worship, expenses and ceremonies in connection therewith." Various consequential directions followed including a reference to the Registrar to inquire and report as to what would be a sufficient sum to meet the annual expenses of the upkeep and worship of the plaintiff idol and of the ceremonies in connection therewith as provided in the deed of 1888.

The learned Chief Justice in his judgment deals with the effect of the consent order of 1904, and states that he is not prepared to hold on the strength of a well-known passage

in the judgment of this Board in *Konwur Doorganath Roy* v. *Ram Chunder Sen*[1] that there is in Hindu law any warrant for the proposition that at any particular time by consent of all the parties then interested in the endowment a dedication in favour of a private idol may be set aside and he finds in addition in the present case special reasons why the consent decree of 1904 should not be held to have validly terminated the debutter character of the properties. Their Lordships are not called upon to consider this question for none of the respondents at their Lordships' bar maintained that the consent order precluded the present appellant from raising the issue of the continued validity of the endowment, and their Lordships, therefore, say nothing upon the subject. They take note of the matter only as one episode in the somewhat chequered legal history of the endowment.

The two grounds on which the judgment of the Appeal Court was challenged before their Lordships related to the interpretation placed upon the deed of dedication by the Appeal Court and to the plea of limitation upheld in favour of Satya.

As to the first of these matters, the learned Judge of first instance states that "it has not been argued that there was no valid dedication or that the idol was not effectively endowed with the properties in suit by the deed of 1888." In the Appeal Court, however, the defendants were allowed to raise the question of the construction of the deed of dedication. It is fully dealt with in the judgment of the learned Chief Justice and must now in turn be considered by their Lordships.

The material provisions of the dedication deed are conveniently summarised by the learned Chief Justice in the following passage from his judgment:

"The Deed of 1888 opens by describing how Lalchand and Kalachand [the uncle and father of the granters Rakhal and Brojo] established the deity in their lifetime, how they prospered, how they bought land on Royd Street and in Entally, how 'with the income of all the said lands and with the money earned by them' they used to cause daily and special shebas to be performed, Brahmins and poor persons to be fed and festivals to be observed. It then recites that Lal Chand died, that Kalachand purchased land on Elliot Road, that he continued the Sheba and festivals as before, that he intended to build a house on the land in Entally for the location of the

1. (1876) L.R. 4 I.A. 52 at 58: I.L.R. 2 Cal. 341 (P.C.).

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Thakuranis and for the residence of the Shebaits and to make the house and the lands specified in the schedule Debutter, but that he died before carrying out his intention; that after his death Rakhal 'with the income of all the said lands' caused the Sheba to be performed and people to be fed as before; that when Brojo had attained majority, the two brothers had been carrying on the Sheba, etc., as before. The Deed then recites that Rakhal and Brojo had built a house for the location of the Thakurs and the residence of the Shebaits on the Entally land; and states that for the continuance in perpetuity of the Shebas and the feeding of Brahmins, etc., in perpetuity they grant the properties in the schedule to the auspicious lotus feet of the Thakuranis as Debutter. They make provision for the Shebaiti right to go to their male heirs by primogeniture; they provide that the Shebaits should keep accounts and that other heirs shall be competent to inspect the accounts. There is a provision for the removal from office of a Shebait acting improperly, and a provision to exclude females from the Shebaiti. There is a provision in certain circumstances for Shebaits to be appointed by Deed. It is provided that the Shebaits are to employ two Durwans and a Mali and other servants for the purposes of the Sheba and a Tahsildar for keeping accounts, collecting rents, etc., as well as a Pujari to perform the worship. Then come the passages upon which the present question must turn. Out of the income is first of all to be reserved sufficient money for taxes and repairs to the Thakur Bari and the existing house at Entally; then out of the said income the Shebaits are to cause the daily and other worship to be performed and 'at an outlay of reasonable expense' shall entertain Brahmins, feed the poor. The Deed proceeds 'The Shebaits shall purchase Government securities, that is Company's papers, with the surplus annually left after meeting the prescribed expenses'. It provides that when a large amount of money gradually accumulates in this manner, they shall cause tenanted houses to be built on the lands specified in the schedule and take measures for improvement and increase of the income of the Debutter properties. So far, therefore, the Deed contemplates that there shall be a surplus and that this surplus shall be invested so as to increase.

"In the next page in the Deed the Shebaits are given a right to reside in the house in which the deities are located and as far as practicable, other heirs may reside in the house. Then comes the only clause which operates to give an ultimate destination to the accumulating funds: The Shebaits are directed 'to build with the said money additional masonry building, house, etc., on the Debutter lands and give them for the convenience of residence and habitation of our heirs. If in the course of time the number of heirs becomes large, the nearer heirs shall reside in this house as far as practicable'. The remaining passages in the Deed are important in so far as they disclose that the tenants on the scheduled lands are mere tenants at will, which means that so far as occupied, the property was Bustee property. It states that the value of the properties granted as Debutter is Rs. 47,000".

In the "schedule of properties" annexed to the deed the first item is the land in Entally of over six bighas in extent, on which the Thakurbari stands, occupying 14 cottahs, and the tenanted house occupying about one cottah; the remainder of the Entally land is let to temporary tenants or in other words is Bustee property. The two other properties described in the schedule are the Elliot Road property and the Royd Street

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property, the former over four bighas in area and the latter over five cottahs.

The effect of a valid deed of dedication is to place the property comprised in the endowment *extra commercium* and beyond the reach of creditors. The dedication is not invalidated by reason of the fact that members of the settlor's family are nominated as shebaits and given reasonable remuneration out of the endowment and also rights of residence in the dedicated property. In view of the privileges attached to dedicated property, it has not infrequently happened, as the Law Reports show, that simulate dedications have been made, and a close scrutiny of any challenged deed of dedication is necessary in order to ascertain whether there has been a genuine divestiture by the settlor in favour of the idol. The dedication, moreover, may be either absolute or partial. The property may be given out and out to the idol or it may be subjected to a charge in favour of the idol. "The question whether the idol itself shall be considered the true beneficiary, subject to a charge in favour of the heirs or specified relatives of the testator for their upkeep, or that, on the other hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the upkeeep, worship and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will" (*Pande Har Narayan* v. *Surja Kunwari*[1]). It is also of importance to consider the extent of the property alleged to be dedicated in relation to the expense to be incurred and the ceremonies to be observed in the worship of the idol. The purposes of the dedication may be directed to expand as the income increases, or the purposes may be prescribed in limiting terms so that if the income increases beyond what is required for the fulfilment of these purposes it may not be protected by the dedication.

Their Lordships have read the deed of dedication with these considerations in mind, and they have been much assisted by the careful analysis to which its provisions have been subjected by the learned Chief Justice. They have no difficulty in agreeing with his conclusion that the deed effectively dedicated to the service of the idol the Thakurbari, or building

1. (1921) L.R. 48 I.A. 143 at 145-146: I.L.R. 43 All. 291 (P.C.).

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in which the idol is located, at 30, Beniapukur Road on the Entally land and also the shebait's house there, subject only to the question, to be dealt with later, of Satya's claim under the Limitation Act.

But different considerations apply with regard to the remaining properties comprised in the deed of dedication and deed of sale. In the first place, throughout the deed of dedication the observances prescribed are repeatedly referred to as those originally in use to be performed, and their Lordships agree with the learned Chief Justice that, on a fair reading of the deed as a whole, it was not intended that the ceremonies and expenditure should increase indefinitely with the growing income yielded by the properties. (See *Surendrakeshav Roy* v. *Doorgasundari Dassee*[1].) From the nature and situation of the properties and the directions given for their development, it must have been clearly contemplated that the income derived from them would be a growing one and must exceed the expenditure required for the prescribed ceremonies and charities. It is significant that in 1922 and 1924 Pulin was able to raise on mortgage Rs. 53,000 on the security of parts only of the properties. In these circumstances the directions as to the disposal of the surplus income become of much importance. The clause dealing with the ultimate surplus directs that it shall be applied in the building of additional premises "for the convenience of residence and habitation of our heirs". This destination, it will be observed, is not in favour of the shebaits, but is really in substance a gift in favour of the settlors' heirs generally.

For the reasons thus summarised, their Lordships find themselves in agreement with the conclusion which the learned Chief Justice reaches "that the only construction which it is possible in law to put upon the deed of 1888, notwithstanding the language of certain passages therein, is that there is a charge for the upkeep, worship and expenses of the idol, and that the idol cannot claim to have an absolute interest in any portion of the property which is governed by the provision that tenanted houses should be built on the land for the increase of the income of the trust. It is, I think, otherwise with the Thakurbari and the shebait's house on 30, Beniapukur

1. (1892) L.R. 19 I.A. 108 at 127-128: I.L.R. 19 Cal. 513 (P.C.).

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Road". The property conveyed by the deed of sale of 1896 cannot be differentiated in any material respect and must go with the property comprised in the deed of dedication (apart from the Thakurbari and shebait's house).

It only remains to consider whether the High Court rightly decided that Satya had acquired by limitation a title to one-half of the Thakurbari and shebait's house. Pleas of limitation were advanced in the Courts below also on behalf of the respondent Brojo Nath and the mortgagees deriving right through Pulin, but these were repelled, the Chief Justice holding that the office of shebaits held by Brojo and Pulin disabled them from possessing adversely to the idol. As this decision was not made the subject of appeal, their Lordships are absolved from the necessity of discussing the topic.

Satya, however, was in a different position from his half-brother and his uncle. As the learned Chief Justice points out, Satya was never a shebait of the idol, and therefore never was under any fiduciary disability in the matter of possessing adversely to the idol. When he was three years old, his father being dead, his mother repudiated the deed of dedication and by the consent decree of 1904 one-half of the property alleged to have been dedicated was declared to belong jointly to Pulin and Satya. From 1904 onwards for at least 12 years Satya openly and without any fraudulent collusion enjoyed continuous possession of his share of the Thakurbari and shebait's house on the basis that the consent order of 1904 was effective and that the property was not subject to dedication. It is so found by the learned Chief Justice in the Court below both on evidence and on admission, and their Lordships accept the finding. True, the possession of Satya for the 12 years from 1904 was jointly with Pulin, but Satya was not affected by any fiduciary disability attaching to Pulin, and there was nothing to prevent his possession of his half from being adverse to the appellant idol. Their Lordships accordingly see no reason to disturb the finding of the High Court in favour of Satya.

The result is that their Lordships will humbly advise His Majesty that the appeal be dismissed and the decree of the High Court dated the 13th May, 1932, and filed the 3rd September, 1932, be affirmed. The appellant must pay to the

P.C.

Sri Sri Iswari Bhubaneshwari Thakurani v. Brojo Nath Dey.

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respondent Satya Charan Dey his costs in the appeal and to the other respondents one set of costs among them.

Solicitors for Appellant: *Nehra & Co.*

Solicitors for Respondents: *Barrow, Rogers & Nevill, A. J. Hunter & Co.* and *Douglas Grant & Dold.*

R. C. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE STODART.

T. S. Moidheen Pichai Sahib .. *Appellant** (*Plaintiff*)

v.

Nagoore Meera Rowther and others .. *Respondents* (*Defendants*).

Moidheen Pichai Sahib *v.* Nagoore Meera Rowther.

Res judicata—*Mortgage—Sub-mortgage effected by mortgagee—Suit by sub-mortgagee impleading mortgagors and mortgagee*—Ex parte *decree passed —Subsequent suit by assignee of mortgage to enforce security—Whether barred by reason of decree in suit filed by sub-mortgagee.*

Each of three brothers executed a hypothecation bond for a certain amount to the mortgagee. The mortgagee sub-mortgaged his mortgage rights in favour of another person. Later, the sub-mortgagee instituted a suit for the sale of the hypothecated property in exercise of his rights and impleaded therein the mortgagee and the original mortgagors. The defendants remained *ex parte* and the suit mortgage having been found to be subsisting the Court passed a decree in favour of the plaintiff for the amount sued for. The original mortgagee died subsequently and his interests in two of the mortgages having been assigned over to the plaintiff he sued for recovery of the mortgage amount. The defendants contested the suit and raised the plea among others that the suit was barred by *res judicata* by reason of the decree passed in the earlier suit instituted by the sub-mortgagee. It was shown that the sub-mortgagee's decree was for a much smaller amount than the claim of the mortgagee in the later suit.

Held, that the causes of action in the two suits were different and that the later suit instituted by the assignee of the mortgage rights was not barred by *res judicata* by reason of the decree passed in the earlier suit instituted by the sub-mortgagee.

Muthukrishnien v. *Viraraghava Iyer*, (1912) 23 M.L.J. 430; *Raghunath Singh* v. *Hansraj Kunwar*, (1934) 67 M.L.J. 813: L.R. 61 I.A. 362: I.L.R. 56 All. 561 (P.C.) and *Viroopakshan Nambudripad* v. *Chembu Nayar*, (1936) I. L. R. (1937) Mad. 545: (1937) 1 M.L.J. 83 (F.B.), referred to.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul dated 14th July, 1930, in O.S. No. 7 of 1927 (A.S. No. 217 of 1930, District Court, Madura) withdrawn and transferred to the High Court.

K. V. Srinivasa Aiyar for Appellant.

S. R. Muthuswami Aiyar for Respondents.

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* Appeal Nos. 42 and 334 of 1931. 22nd January, 1937.

Moidheen Pichai Sahib v. Nagoore Meera Rowther.

Madhavan Nair, J.

The judgment of the Court was delivered by

Madhavan Nair, J.—These are two connected appeals. The plaintiff is the same in the two suits out of which these appeals arise. The first defendant in the two suits are brothers. They had another brother. Each of these three brothers executed a hypothecation bond for Rs. 3,000 in favour of one, Usain Ali Rowther. The hypothecation bonds involved in these two suits are Exhibits A and B—two of the three hypothecation bonds. The mortgagee, Usain Ali, sub-mortgaged his mortgage rights under the three mortgages in favour of the fifth defendant, a Chetti firm under Ex. C. The sub-mortgage was for an amount not exceeding Rs. 9,000 that may be borrowed from the firm. The Chetti firm instituted O.S. No. 34 of 1921, a suit for the sale of the hypothecated properties, in exercise of its rights. The present plaintiff's predecessor, Usain Ali, was the first defendant in the suit, and the mortgagors were defendants 3 and 4. It was found in that suit that the mortgages and sub-mortgages were subsisting, and a decree was passed in favour of the plaintiff therein, for the amount sued for. In that suit, the mortgagee as well as the mortgagors, were *ex parte*. That decree was not executed by the sub-mortgagee plaintiff and is at present subsisting. The original mortgagee having died, his interests in the two mortgages were assigned over to the present plaintiff, and these two suits have been instituted by him for the recovery of his mortgage amount. Various issues were raised in the case. One of the issues was "whether the suit is barred by reason of the decree in O.S. No. 34 of 1921 on the file of this Court". On this issue, the learned Judge held that the suit was barred and dismissed the suit.

In this appeal, the question argued relates to this finding. Counsel for the appellant contends that the suit is not barred by reason of that decree. The decision of the lower Court is based upon various considerations. One of the main grounds of justification is this, namely, that the cause of action of the mortgagee, the present plaintiff, and of the sub-mortgagee who was the plaintiff in the original suit is one and the same and that the cause of action was exhausted by the previous suit and the decree, and it cannot therefore be agitated again in a subsequent suit. With this opinion we cannot agree. No doubt the sub-mortgage is an assignment of the mortgage, but

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in this case it must be observed that the mortgages amounted to Rs. 9,000, and what was sub-mortgaged was only a sum up to Rs. 9,000 and the exact amount involved in the previous suit, O.S. No. 34 of 1921, was only Rs. 958. So, on the facts, it is clear that there is no complete assignment of the cause of action of the mortgagee in favour of the sub-mortgagee. Apart from this, as we have said, it is clear that the causes of action of the two suits are different. (See *Muthukrishnien* v. *Viraraghava Iyer*[1].) The learned Judge after referring to the decision in *Muthu Vijia Raghunatha Ramachandra Vacha Mahali Thurai* v. *Venkatachallam Chetti*[2] which says that the sub-mortgagee can bring a suit for the sale of the mortgaged property, says that:

"*Muthu Vijia Raghunatha Ramachandra Vacha Mahali Thurai* v. *Venkatachallam Chetti*[2] did not decide that a sub-mortgagee could sue to recover the debt due to his mortgagor, but only that the sub-mortgagee could in suing to recover his own debt bring to sale the properties mortgaged to his mortgagor instead of merely bringing to sale his mortgagor's interest. His interest in what was mortgaged to his mortgagor was held sufficient to entitle him to sell what was mortgaged to his mortgagor. It would be going a great deal further to hold that the sub-mortgagee could sue on the cause of action open to his mortgagor to recover the debt due to the latter".

In the present case, it is clear that the sub-mortgagee's claim being only for Rs. 3,400 and odd could never have sued on the cause of action open to his mortgagor which was to recover a sum of Rs. 9,000. So, the main ground relied on by the learned Judge does not apply. In this connection, it may also be pointed out that the learned Judge says, just as the second suit for redemption is held barred, a second suit for sale should also be held to be barred. But recently the Privy Council has held in *Raghunath Singh* v. *Hansraj Kunwar*[3] that a second suit for redemption does lie. (See also *Viroopakshan Nambudripad* v. *Chembu Nayar*).[4] So, that parity of reasoning also cannot apply. It was then pointed out by the learned Judge that the decree passed in the previous suit is a bar to the present suit. Ex. III provided only for the payment to the sub-mortgagee of the amount due to him and for the sale of the mortgaged property and for the sale proceeds being applied towards the discharge of the sub-mortgage and the balance to be paid to the mortgagee. The decree as it stands does not

1. (1912) 23 M.L.J. 430 at 433.
2. (1896) 6 M.L.J. 235: I.L.R. 20 Mad. 35.
3. (1934) 67 M.L.J. 813: L.R. 61 I.A. 362: I.L.R. 56 All. 561 (P.C.).
4. (1936) I.L.R. (1937) Mad. 545: (1937) 1 M.L.J. 83 (F.B.).

make any provision for the realisation of the amount due to the original mortgagee. The decree therefore in the form in which it stands does not preclude the original mortgagee from asserting his rights; Form No. 11 has been referred to by the learned Judge in this connection to show that in a properly framed decree in a suit by the sub-mortgagee, the mortgagee's right to institute a subsequent suit is taken away. But Form No. 11 provides for a decree in a suit brought by the sub-mortgagee. That decree does not give a mortgagee a right to sell. It gives him a right to pay off the sub-mortgagee, but it does not give him a right to sell the property and to recover his dues. No doubt the amount which he is entitled to will be ascertained, but there is no means to bring the property to sale. So the provisions of the decree cannot stand in the way of assertion of his rights by the mortgagee in a subsequent suit. The result of the learned Judge's finding is that the mortgagee will have to lose all his rights because the sub-mortgagee does not execute the decree in his present suit. That cannot be right, and we do not think that there is any prohibition in law against the mortgagee afterwards instituting a suit in the assertion of his cause of action which as we have held is separate from that of the sub-mortgagee. In our opinion the suit is maintainable.

Another question raised was "whether the suit document has been discharged in the manner alleged by the first defendant". In view of the Judge's finding that the suit was not maintainable, a decision on this point was unnecessary. But still the learned Judge on an application made by the defendant in I. A. No. 181 of 1930 has given a decision that it cannot be said that the defendants are in any way barred from raising the plea of discharge. We do not express any opinion on this decision as the learned Judge, having regard to his decision under Issue 2, cannot obviously have considered it with all the fullness it deserves, and as pointed out by the learned Counsel for the appellant, a correct decision on this point would depend also on certain facts which are raised in the pleas of the defendants which have not been dealt with in the learned Judge's discussion of the question. In these circumstances, it will be open to the lower Court to consider this issue also in deciding the case along with the other issues. As we have held that the suit is maintainable, we remand the two suits to the lower Court for disposal according to law.

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Madhavan Nair, J.

Court-fee in these appeals will be refunded. The appellant is entitled to his costs, but he will get the same only in one appeal, namely, in Appeal No. 42 of 1931.

B. V. V. —— *Cases remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

Sri Jagannadha Rajamoni Raj Deo (minor) by Guardian, the Sub-Collector, Chicacole .. *Appellant* (2nd Respondent)*

v.

V. Ramachandra Rao .. *Respondent (Petitioner-Decree-holder).*

Sri Jagannadha Rajamoni Raj Deo *v.* Ramachandra Rao.

Madras Court of Wards Act (I of 1902), S. 45—Meaning of words 'decree capable of execution by sale of immovable property'—Decree for payment of money—Attachment by decree-holder of moneys of estate in Collector's hands—G. O. declaring such decrees transferable to Collector—Attachment of moneys not good—Decree to be transferred to Collector for execution—Civil Procedure Code (V of 1908), S. 68—No bearing on the question.

It would be wrong to hold that the words 'decree capable of execution by sale of immovable property' appearing in S. 45, Court of Wards Act, apply only to decrees in which applications have already been made for attachment and sale of immovable property. The character of the decree is not in any way altered from time to time by the procedure which the decree-holder may adopt in execution of it.

Where a decree-holder had a decree directing a Zamindar and his son to pay the creditor a certain amount from out of the properties of their estate in their hands, and the decree-holder prayed for attachment of the amount of funds belonging to the estate in the possession of the Sub-Treasury under O. 21, r. 52 of the Code, but the Sub-Collector who had taken management of the estate took exception to it on the ground that under S. 45 of the Madras Court of Wards Act the Local Government had declared that "the execution of decrees passed by the Civil Court which are capable of execution of sale of any immovable property of the said ward . . . . shall be transferred to the Collector of the District".

Held, that this decree which was for payment of money was one which was capable of execution by sale of immovable property of the Ward and therefore in pursuance of the Government order it must be transferred for execution to the Collector.

Per *Lakshmana Rao, J.*—The decree in this case is undoubtedly capable of execution by sale of immovable property of the Ward and S. 68 of the Code of Civil Procedure has no bearing. The language too is different and it is not permissible to construe S. 45 of the Court of Wards Act with reference to the terms of S. 68 of the Code of Civil Procedure which provides for transfer of the execution of decrees against immovable property in any local area to the Collector.

* C. M. A. No. 424 of 1936. 26th July, 1937.

Sri Jagannadha Rajamoni Raj Deo *v.* Ramachandra Rao.

Appeal against the order of the Court of the Subordinate Judge of Chicacole dated 9th September, 1936 and made in E. P. No. 29 of 1936 in O. S. No. 57 of 1931 on the file of Sub-Court, Berhampore.

The Advocate-General (Sir A. Krishnaswami Aiyar) for Appellant.

B. Jagannadha Das for Respondent.

The Court delivered the following

JUDGMENTS. *Burn, J.*—This appeal is preferred by the Court of Wards from the order of the learned Subordinate Judge of Chicacole passed in Execution Petition No. 29 of 1936 in O.S. No. 57 of 1931. The respondent holds a decree against the son and the adopted son of the late Zamindar of Mandasa directing them to pay the plaintiff from out of the properties of the Mandasa estate in their hands Rs. 7,966-10-9 with interest thereon at six per cent. per annum from the 7th November, 1931, till payment. The decree-holder prays for attachment of the amount of Rs. 15,000 belonging to the Mandasa estate in the possession of the Sub-treasury of Ichchapur under O. 21, r. 52. The Sub-Collector of Chicacole who has taken over the management of the estate takes exception on the ground that under S. 45 of the Madras Court of Wards Act the local Government has declared that:

Burn, J.

> "The execution of decrees passed by the Civil Court which are capable of execution by sale of any immovable property of the said ward . . . . shall be transferred to the Collector of the Vizagapatam District".

As the learned Subordinate Judge observes, the question for consideration is what is the meaning of the expression 'decrees capable of execution by the sale of any immovable property of the ward'? The learned Advocate-General contends that this description is wide enough to cover an ordinary decree for the payment of money such as this one, since a decree for the payment of money can at any time be executed by attachment and sale of the immovable properties of the judgment-debtor. The contention raised for the decree-holder, which is supported by Mr. Jagannadha Das in this Court, is that the expression "capable of execution by the sale of immovable property" must be understood with reference to the execution proceedings that have actually been taken. The suggestion is that since the decree-holder has not in fact applied for attachment and sale of immovable properties, therefore

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the decree is not one which is capable of execution by the sale of immovable property. The learned Subordinate Judge has accepted this argument but in my opinion he has been misled in so doing. The learned Subordinate Judge says that:

" The decree-holder's capacity to sell the property is co-existent with his desire to sell the same".

This, in my opinion, displays some confusion of thought. It is not correct to say that the decree-holder's capacity is co-existent with or in any way dependent upon his desires. He may be perfectly capable of selling the property but may not wish to do so. In fact, that was the state of mind in which he was when this execution petition was lodged. No one could allege that the decree-holder had not the capacity to bring the judgment-debtor's immovable property to sale. He was fully clothed with that capacity by the provisions of the Civil Procedure Code, but he had no desire to sell the immovable property. What he preferred to do was to attach the cash in the sub-treasury. The learned Subordinate Judge appears to have confused the question of the description of the decree with the method which the decree-holder may adopt to execute his decree. The expression 'decree capable of execution by sale of immovable property' appears to me to be intelligible and clear and I am not prepared to restrict it in the way suggested by Mr. Jagannadha Das. In my opinion it would be wrong to hold that this description only applies to decrees in which applications have already been made for attachment and sale of immovable property. I think that the character of the decree is not in any way altered from time to time by the procedure which the decree-holder may adopt in execution of it. It is common place to say that an ordinary money decree may be executed by attachment and sale of movable or immovable property or by arrest and detention or by the appointment of a receiver. All these remedies may be adopted in succession; but it would be wrong to say that the character of the decree was varied from time to time in accordance with the method adopted by the decree-holder for enforcing it.

Mr. Jagannadha Das is prepared to argue that if this wide meaning is allowed to the expression 'capable of execution by the sale of immovable property' almost any kind of decree can be brought within it. I am not prepared to enter upon a discussion of whether it would be feasible, *e.g.*, to bring a decree for restitution of conjugal rights within this or

not. I am quite clear that this decree which is for the payment of money is one which is capable of execution by sale of immovable property of the ward and therefore disagreeing with the learned Subordinate Judge I hold that it is a decree which in pursuance of the notification of the Government (G.O. Ms. No. 1236 Revenue dated 7th June, 1936) must be transferred for execution to the Collector of Vizagapatam District.

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Burn, J.

For these reasons I think the appeal should be allowed and the order of the learned Subordinate Judge set aside. The respondent decree-holder will way the costs of the appellant.

Lakshmana Rao, J.

Lakshmana Rao, J.—I agree and would only add that the nature or character of a decree does not depend upon or vary with the mode of execution adopted by the decree-holder. The decree in this case is undoubtedly capable of execution by sale of immovable property of the ward and S. 68 of the Code of Civil Procedure has no bearing. The language too is different and it is not permissible to construe S. 45 of the Court of Wards Act with reference to the terms of S. 68 of the Code of Civil Procedure which provides for transfer of the execution of decrees against immovable property in any local area to the Collector.

K. C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE NEWSAM.

Kamalathachi and others .. *Petitioners* (Respondents 2, 3 and 6 in Appeal No. 75 of 1931 on the file of the High Court)*

v.

Meenakshi Achi and others .. *Respondents (Appellant and 4th and 7th Respondents in do.).*

Kamalathachi *v.* Meenakshi Achi.

Civil Procedure Code (V of 1908), S. 110—Leave to appeal to Privy Council—Requirements to be satisfied.

Where in a petition for leave to appeal to the Privy Council it was contended by the respondent that when there were two claims made, one to the property and the other to an account, it should be deemed that there were two distinct subject-matters relying on *Venkitasami Chettiar* v. *Sakkutti Pillai*, (1936) 44 L.W. 533, and that for the purpose of granting of leave each should be considered separately.

* C.M.P. No. 2800 of 1937. 9th August, 1937.

Kamalathachi *v.* Meenakshi Achi.

Held, that when on both the points submitted, the High Court's decision was really a reversing one and if it would lead to an anomaly to grant the right to property without passing a decree for an account, leave should be granted, when also as regards the value, the case fulfils the requirements of S. 110, Civil Procedure Code.

Petition under S. 110 and O. 45, rr. 2, 3 and 8 of the Code of Civil Procedure (Act V of 1908), praying that the High Court will be pleased to grant a certificate enabling the petitioners herein to appeal to His Majesty in Council against the judgment of the High Court in Appeal No. 75 of 1931, preferred against the decree of the Court of the Subordinate Judge of Kumbakonam in O.S. No. 9 of 1927.

T. V. Muthukrishna Aiyar for *N. A. Krishna Aiyar, S. R. Subramania Aiyar, M. S. Venkatarama Aiyar* and *N. K. Ananthapadmanabhan* for Petitioners.

K.S. Krishnaswamy Aiyangar, R. Gopalaswamy Aiyangar, S. Ramanujam, T. R. Sreenivasa Aiyangar and *S. Sankara Aiyar* for Respondents.

The Order of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—This is an application for leave to appeal to His Majesty in Council. The plaintiff in the suit claimed that the property in question belonged in four equal shares to herself and her three sisters defendants 1, 2 and 3. The suit was resisted by the first defendant, who asserted that she was exclusively entitled to the property and denied that it was divisible into four shares. There was a further prayer in the plaint that the first defendant should be directed to render an account of her management of the property. First, dealing with the question of title, the learned trial Judge accepting the plaintiff's contention held that the property was divisible into four shares. Then as regards the claim to an account, the learned Judge held that on the analogy of the principle applicable to the manager of a Hindu coparcenary that the first defendant's liability to account was restricted to the property as it existed at the time of the suit. There was a mortgage for about Rs. 65,000 representing the income from the estate, executed by the first defendant's husband one Balaguruswami Odayar in her favour, and the learned Judge held that in respect of this item alone, the first defendant was liable to account and passed a decree to the effect that the mortgage interest belonged to all the four sisters. There was an appeal to the High Court, and the learned Judges held that on the question of title, that the first defendant was solely entitled

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Venkatasubba Rao, J.

to the property. The title put forward by the plaintiff having been thus negatived it necessarily followed that no relief could be granted on the basis of the first defendant's accountability. The learned Judges therefore did not give any finding, and indeed there was no need to do so, on the question of the first defendant's liability to account.

The present application for leave by the plaintiff's legal representative and defendants 2 and 3 is opposed on behalf of the first defendant, but the opposition is partial as will be seen. The plaintiff's claim is divisible, it is said, into two parts: first, the right to the property itself; secondly, the right to an account. It is not disputed that the requirement of S. 110, Civil Procedure Code, as to the pecuniary value of the subject-matter is fulfilled. In regard to the first part of the claim, the High Court's judgment being a reversing one, the request for leave is not opposed. But it is said that the High Court's judgment in regard to the second part of the claim is an affirming one and it must therefore be shown that the appeal involves some substantial question of law. From the facts adverted to above, this contention, it will be seen, is obviously wrong. The lower Court did not wholly disallow the claim to an account. The finding that the mortgage belonged to the four sisters is tantamount to holding that the first defendant was liable to account in respect of the sum covered by it, in other words, the finding involved that the first defendant was not solely entitled to the amount but her right extended only to a fourth part of it. This being so, the judgment of the High Court which negatived this right, cannot be said to be an affirming judgment. The respondent's contention must therefore be overruled.

Further, to give effect to this contention would lead to an anomaly. Supposing the Privy Council disagreeing with the High Court should find in favour of the plaintiff, is the restricted leave (which alone under this contention we can grant) to fetter their Lordships and prevent them from giving effect to their decision, that is, by passing a decree for an account? There can be no doubt whatsoever that we ought not to make an order leading to an anomaly of this sort. It has been contended that when there are two claims made, one to property and the other to an account, it should be deemed that there are two distinct subject-matters vide

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Venkitasami Chettiar v. *Sakkutti Pillai*[1] and that for the purpose of the granting of leave each should be considered separately. In the view we have taken, it is unnecessary to consider this question.

In the result, we hold that the judgment of the High Court is a reversing one and certify that as regards the value of the subject-matter, the case fulfils the requirements of S. 110.

Leave is granted.

K. C. —— *Leave granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

The Champion Automobiles, Ltd. by director K. M. Rao .. *Petitioners** (*Plaintiffs*)

v.

The Chartered Bank of India, Australia and China, Esplanade, Madras .. *Respondents* (*Defendants*).

Champion Automobiles, Ltd. v. Chartered Bank of India, Australia and China, Madras.

Contract—Collecting bank—Liability of—Goods sent by post parcel in favour of bank—Bank intimating the arrival of the parcel to the owner but not the date of arrival—Owner paying money to bank—Bank giving papers necessary to receive the parcel, to owner—Parcel sent back by the time to consignor—If bank liable to refund the money—Misrepresentation.

A firm of merchants in Madras C. A. Co., entered into a contract with E. Co., a manufacturing company of New York, through their representatives, the A. P. Co. in and by which they indented for certain goods. Under the terms of the contract an invoice had to be sent in the name of C. A. Co., the bill to be drawn on them through the defendant bank and the shipment of goods to be by post parcel and the condition as regards payment to be thirty days after sight—documents against payment. A post parcel was consigned to the defendant which arrived here on 12th December, 1932. On 12th December, 1932, the bank presented a bill of exchange drawn on C. A. Co., by E. Co., and endorsed in their favour in and by which the drawees ought to pay the amount within thirty days after sight and it was accepted by C. A. Co., on 12th December, 1932. The bill became due and payable on 14th January, 1933, adding the customary days of grace which date was stamped on the bill itself. On 14th January, 1933, the bank presented a memorandum of the amonnt payable by C. A. Co., and in accordance therewith the company paid the amount. The bank delivered an invoice and a second bill of exchange. As these documents were not enough to enable the C. A. Co. to obtain delivery of post parcel, the bank gave a letter of authority on 17th January, 1933. When with these C. A. Co., applied to the post office for delivery, they were told that the parcel arrived on the 12th December, and that as it was not taken delivery of within thirty days though the bank was informed of its

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1. (1936) 44 L.W. 533.

* C. R. P. No. 956 of 1935. 10th March, 1937.

arrival, it had been returned to the sender as "not claimed". The bank had written to C. A. Co., on 23rd December, 1932, and 6th January, 1933, of the arrival of the parcel at the post office but did not therein state that it arrived on the 12th December, itself. In a suit by C. A. Co. against the bank for the recovery of the amount paid to the bank,

Held, that the bank as a collecting bank is under no obligation to keep the goods but they are under a duty to see that by any act or omission of theirs the buyer is not prevented from taking delivery of the goods. It was the duty of the bank to have informed the buyer C. A. Co. that the goods arrived on the 12th December, so that they might be made aware of the fact that if they are not taken delivery of by 12th January, they would be sent back. Inasmuch as the bank had not done so, it was clearly guilty of negligence and by taking the money after the goods were sent back, which fact the bank must be deemed to know, the bank was making a misrepresentation and was liable to refund the amount.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the decree of the Court of the Full Bench of the Court of the Small Causes, Madras, in F. B. A. No. 457 of 1933 dated 15th March, 1935 in S. C. Sm. No. 12015 of 1933.

M. Chelva Aiyangar and *P. G. Raghavendra Rao* for Petitioners.

T. S. Venkatesa Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The material facts necessary for the decision of the points involved in this revision petition are these. The plaintiffs who are a firm of merchants carrying on business under the name of the Champion Automobiles, Ltd., entered into a contract with Eis Manufacturing Company, New York, through their representatives the Automotive Products Company, in and by which they indented for certain goods. Under the terms of the contract an invoice had to be sent in the name of the Champion Automobiles, Ltd., the bill to be drawn on them through the Chartered Bank of India and the shipment of goods to be by post parcel and the condition as regards payment to be thirty days after sight documents against payment. On the 12th December, 1932, the Chartered Bank of India presented a bill of exchange drawn on the plaintiffs by Eis Manufacturing Company and endorsed in their favour in and by which the drawees ought to pay the amount within thirty days after sight and it was accepted by the plaintiffs on the 12th December, 1932. The bill became due and payable on 14th January, 1933, adding the customary days of grace and which date was stamped on the bill itself. On the 14th January, 1933, the Bank presented a memorandum of the

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amount payable by the plaintiffs and in accordance therewith the plaintiffs paid a sum of Rs. 214-1-0. The defendants delivered an invoice and a second bill of exchange. The plaintiffs complained that these documents would not enable them to obtain delivery of the post parcel and thereupon the defendants gave a letter of authority enabling the plaintiffs to obtain delivery of the goods from the post office on the 17th January, 1933. In pursuance thereof when the plaintiffs applied to the post office to deliver them, the post office authorities replied by their letter dated 24th January, 1933, that the parcel arrived on the 12th December, 1932, that due intimation thereof was given to the defendant Bank but the Bank requested them to keep in deposit by a letter dated 16th December, 1932, and as the parcel was not taken delivery of within the prescribed period, namely, thirty days, it was returned to London on 12th January, 1933, with remarks "Not claimed". The suit is therefore brought for the recovery of the amount paid to the defendants on the ground of failure of consideration and as money had and received for their use. The defendants denied liability alleging that they were only a collecting Bank, that by letters dated 23rd December, 1932, and 6th January, 1933 (Exs. C and D) they duly intimated the arrival of the parcels to the plaintiffs, that they were under no obligation to keep the parcel in the post office, that they were not liable for the payment of the amount and that there was no cause of action as against them. The learned third Judge of the Small Cause Court, who tried the case, gave a decree in favour of the plaintiffs on the ground that the defendant Bank was guilty of negligence in not keeping the parcel till the due date of payment. On appeal to the Full Bench the learned Judges of the Full Bench reversed this decision on the ground that the Bank was under no obligation to keep the parcel and that there was no warranty given by them about the genuineness of these documents or the usefulness of the documents which they delivered to the plaintiffs. It is against this decision that the civil revision petition has been filed.

The question in this case is, is the Bank liable to refund the amount paid by the plaintiffs? Before deciding this question it is necessary to find out exactly what the relative rights of the parties are under the terms of the contract and the obligation of the defendants in relation thereto. The contract was not

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with the Bank but with Eis Manufacturing Company through their agents the Automatic Products Company. On a fair reading of the contract it is clear that the plaintiffs are entitled on payment to have delivery of all the documents which would enable them to have delivery of the parcel consigned to them. The due date in this case was the 14th January, 1933. Therefore, as soon as the payment was demanded and made, the Bank was bound to have put the plaintiffs in possession of all the customary documents. If this were an ordinary c.i.f. contract, there can be no doubt what the plaintiffs would have been really entitled to. "The essential feature of an ordinary c.i.f. contract" as observed by McCardie, J., in *Manbre Saccharine Company* v. *Corn Products Co.*[1]:

"Rests in the fact that the performance of the bargain is to be fulfilled by delivery of documents and not by the actual physical delivery of goods by the vendor. All that the buyer can call for is delivery of the customary documents. This represents the measure of the buyer's right and the extent of the vendor's duty."

He later on observes:

"It is also clear that he can make an effective tender even though he possesses at the time of tender actual knowledge of the loss of the ship or goods. For the purchaser in case of loss will get the documents he bargained for; and if the policy be that required by the contract, and if the loss be covered thereby, he will secure the insurance moneys. The contingency of loss is within and not outside the contemplation of the parties to a c.i.f. contract."

In such a case therefore the bill of lading represents the goods and the transfer of the bill of lading is enough to pass the property in the goods and entitle the buyer to take delivery of the goods and in case of loss he gets the policy of insurance which will compensate him in case he is not able to get the goods.

In this case there is no bill of lading because the goods are to be sent by parcel post; there is no policy of insurance to cover any question of loss. Even giving effect to the said principles, so far as they can be applied to the facts of this case, when the parties contemplated shipment by parcel post, it must be presumed that the buyer is entitled to a tender of all the customary documents which would be effective enough to obtain delivery of the goods. No evidence of what the customary documents are, has been given in this case.

1. (1919) 1 K.B. 198 at 202.

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From the correspondence it appears that a letter of authority from the Bank to the post office authorising the post office to deliver the goods to the plaintiffs was apparently treated as one of the documents which the plaintiffs were entitled to get from the Bank on payment. It will be seen that the post parcel was consigned to the Chartered Bank of India and without such a letter there could be no valid tender. What happened in this case is that on the 14th January the defendant Bank did not tender such a letter and not until the 17th such a letter was tendered. It may be contended by the non-delivery of such a letter on the 14th, the Bank did not perform what was expected of them and there was a breach of the terms of the contract or obligation which the Bank must be deemed to have undertaken on behalf of the sellers; but as the plaintiffs did not complain of any such breach and the Bank did deliver such a letter on the 17th, the Bank must be deemed to have tendered this letter on the 14th January, 1933. But the point in controversy between the parties is whether the Bank is under any obligation to keep the goods in the post office till the date of payment; and if the Bank is not, are they liable? Mr. Venkatesa Aiyar's argument is that the Bank is a collecting Bank and the law fastens no obligation on them. The rule in regard to the liability of a collecting Bank is thus stated in Hart on Banking:—

> "The collecting Banker is under no special duty, as such, to protect the interests of the person to whom he presents a draft for acceptance or payment. So long as he does not give any personal undertaking or make any misrepresentation, he incurs no responsibility to him."

So it may be that the Bank is under no obligation to keep the goods but they are under a duty to see that by any act or omission of theirs the buyer is not prevented from taking delivery of the goods. As one of the terms of the contract is that the shipment is to be by parcel post, it may be assumed that it was in the contemplation of the parties that such a parcel according to the rules of the post office could only be kept for a specified period and after the lapse of that period the goods will not be available for delivery until steps are taken to keep the property without being returned. So, it may be that the plaintiffs must be deemed to have been aware of the fact that the goods cannot be kept more than thirty days after the arrival at the post office if they have not been cleared in the meanwhile, and if the plaintiffs are apprised of the date of

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arrival, an obligation may be said to have been cast on them for taking steps to see that the goods are not sent back, but before such an obligation is cast upon the plaintiffs, it is, in my opinion, the duty of the Bank to inform the plaintiffs that the goods arrived on the 12th so that the plaintiffs may be aware of the fact that, if the goods were not cleared by 12th January, they would be sent back. The letter of the 23rd December, 1932, simply states that the parcel relating to the bill arrived at the post office and that the plaintiffs are required to take delivery of the parcel at an early date. Ordinarily, one would understand that the goods arrived on that date or at about that date and the plaintiffs may well have thought that the goods would be cleared within a month from that date. Even in the letter of the 6th January, 1933, except the bare intimation that if the goods were not cleared at an early date, the parcel would be returned to the senders by the post office, no intimation of the date of arrival was given therein. It seems to me that the Bank was clearly guilty of negligence in not intimating the date of arrival to the plaintiffs.

Mr. T. S. Venkatesa Aiyar relied on *Leather* v. *Simpson*[1] and *Guaranty Trust Company of New York* v. *Hannay and Company*[2] for the position that the Banks in those cases were held not responsible when the bill of lading turned out to be a forgery because they did not give any personal undertaking as to the bill of lading being genuine. But still, if the Bank had done anything with reference to that bill of lading by which the buyer is prevented from taking delivery of the goods, could the Bank say that they are not responsible? To take a concrete illustration, if by some act or omission of the Bank a sheet of the bill of lading is torn or burnt and the document delivered would not identify the goods that were shipped to the consignee, could the Bank escape responsibility? The omission of the Bank in not intimating the date of arrival would stand on a similar footing and their conduct in taking the money, when they were aware or must be deemed to have been aware that the goods were sent back to the consignors amounts to a misrepresentation within the meaning of the rule enunciated in Hart and referred to above by me.

I therefore reverse the decision of the Full Bench and restore that of the trial judge. In the result the Civil Revision

1. (1871) 11 Eq. 398.
2. (1918) 2 K.B. 623.

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Petition is allowed, but in the circumstances of the case, I direct each party to bear his own costs throughout.

S. V. V. —— *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice,* MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MOCKETT.

Thayarammal .. *Petitioner* (Plaintiff)*

v.

Pitty Kuppuswamy Naidu .. *Respondent (Defendant).*

M. Krishnammal by her Power Agent by T. Balasubramania Pillai .. *Applicant.*

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Thayarammal *v.* Kuppuswamy Naidu.

Practice—Power-of-attorney agent for suit—Appointment of advocate by principal direct—Power not revoked—If advocate entitled to appear—Effect of the power-of-attorney—Civil Procedure Code (V of 1908), O. 3, rr. 1 and 2.

One *K* filed a suit against her sister *T* and in connection with that had executed a power-of-attorney in favour of *B* to "search the records and apply for copies thereof in the above matter, to file into and receive from Court all papers relating thereto and serve affidavits, to file necessary petitions and to verify and sign the same, to appear and plead in person on my behalf, to engage advocates if necessary and to sign in their vakalats, to do all acts necessary in the conduct of the above proceedings and in furtherance thereof". Later she gave a vakalat in favour of an advocate but *B* objected to the advocate's appearance before his power-of-attorney was revoked.

Held that, (*i*) rr. 1 and 2 of O. 3, Civil Procedure Code, do not give the agent with a power-of-attorney to appear and conduct judicial proceedings any right to *plead* in Court on behalf of his principal either in the Appellate or Original Sides of the High Court. (*ii*) Such a power-of-attorney holder does not stand in the same position as that of an advocate holding a vakalat and therefore the agent is not entitled to notice if his principal wants to appear and conduct the proceedings himself or appoints an advocate to appear for him. (*iii*) The power-of-attorney agent cannot carry on business as a solicitor or attorney, drafting, engrossing and filing plaints, Judge's summons, affidavits and generally issuing legal process and charge fees to the principal.

Whether or not he is carrying on business is a question of fact in each case and it is not necessary that there should be more than one instance therefor.

T. R. Srinivasa Aiyangar for Petitioner.

T. Balasubramania Pillai Power-of-Attorney Agent in person

The judgment of the Court was delivered by

* T. O. S. No. 7 of 1935. (Application No. 1964 of 1936). 21st April, 1937.

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The Chief Justice.—This matter has been referred to us by Gentle, J.

The following questions have been raised, namely:—

(1) Whether an agent with a power-of-attorney to appear and conduct judicial proceedings has the right of audience in Court;

(2) Whether the agent is entitled to notice if his principal wants to appear and conduct the proceedings himself in person or appoints an advocate to appear for him; and

(3) Whether the power-of-attorney agent can carry on business as a solicitor or attorney, drafting, engrossing and filing plaint, judge's summons, affidavits and generally issuing legal process and charge fees to the principal.

That all three questions stand to be answered in the negative seems to us to be clear; but as the respondent has definitely asserted a right to the notice specified in Question No. 2 and certainly by strong implication if not by his conduct to the right of audience stated in Question No. 1 and the matters in Question No. 3 also arise both out of his conduct and claim, we consider that this matter which is of course of extreme importance to the legal profession should be fully discussed by us.

The matter arises in the following way. The respondent is the holder of a power-of-attorney given to him by one Krishnammal, a widow. Krishnammal had filed a suit in the Madras City Civil Court against her sister Thayarammal to get her half share in the assets of one Palla Kuppammal deceased and it was necessary to apply for a search and get copies of the records in O. P. No. 58 of 1935 (T. O. S. No. 7 of 1935) on the file of the High Court and to take further proceedings therein. Being unable to stay in Madras she appointed the respondent as agent:

"To search the records and apply for copies thereof in the above matter, to file into and receive from Court all papers relating thereto, to swear affidavits, to file necessary petitions and to verify and sign the same, to appear and plead in Court in person on my behalf, to engage advocates if necessary and to sign in their vakalats, to do all acts necessary in the conduct of the above proceedings and in furtherance thereof".

In the before-mentioned litigation (T. O. S. No. 7 of 1935) a petition was posted on 16th November, 1936, before the Master and on that date, when the petition was called on, Mr. T. R. Srinivasa Aiyangar appeared on behalf of Krish-

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nammal having been given a vakalat by her. The petition was adjourned and the respondent filed an affidavit on the 26th November, 1936, stating that Krishnammal had neither orally nor in writing intimated to him that she did not wish him to appear in the litigation and without revoking his power-of-attorney (which he marked as an exhibit) had engaged Mr. T. R. Srinivasa Aiyangar and he further stated that Krishnammal did this in order to deprive him of the remuneration due to him payable by her, and he claimed that the power-of-attorney was of the same force and validity as that of a vakalat and that, unless it was revoked by formal proceedings through Court, no orders could be passed on the petition. Therefore, by reason of the authority given to him in the power-of-attorney, he claimed the same right as a legal practitioner who has been given a vakalat; and since the power-of-attorney authorises him to plead in Court it follows that he claims that right; and indeed we are informed that either in these proceedings or in some other Lakshmana Rao, J., allowed him to address the Court. In view of the claim put forward by the respondent in the affidavit referred to, the Master posted the matter before Gentle, J., for orders and he has referred the matter to us and it has been fully argued here by by the learned Counsel for the petitioner, Krishnammal, the Bar Council, the Avocates' Association and the Attorneys' Association; and we have also heard the respondent in person. We may say at once that there is an unreported Bench decision of this High Court directly in point on the first question in C. M. P. No. 498 of 1911 where it was held by Benson and Sundaram Aiyar, JJ., that a right to appear in Court for his principal given to a recognised agent by O. 3, rr. 1 and 2, Civil Procedure Code, does not include a right to plead, that it means simply that one can take proceedings to submit oneself to jurisdiction, that the High Court has under the Letters Patent and the Legal Practitioners Act and under Ss. 119 and 122, Civil Procedure Code, power to make rules as to who shall plead for parties before the High Court in its original and appellate jurisdiction and in the lower Courts, that S. 10 of the Letters Patent makes provision with regard to who alone can plead before the High Court and that others such as recognised agents cannot have the right to plead. There are also two decisions of the Calcutta High Court upon this point, namely,

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Hurchand Ray Gobourdhon Das v. *The Bengal-Nagpur Railway Co.*[1] and In re *Eastern Tavoy Minerals Corporation, Ltd.*[2] In the former, a recognised power-of-attorney agent claimed a right to plead in Court on behalf of his principal under O. 3, r. 1, Civil Procedure Code, but it was held by Jenkins, C.J., and Chatterjee, J., that he had no right of audience; and in the latter case, a director of a company holding a power-of-attorney authorising him to appear for and on behalf of the company, to conduct and represent the company, in the proceedings claimed the right of audience on behalf of the company, and, applying the ruling in the former case, it was held that he had no right of audience. It is plain from these three cases that rr. 1 and 2 of O. 3, Civil Procedure Code, do not give the recognised agent any right to plead in Court on behalf of his principal either in the appellate or original sides of the High Court and, even if it could be contended successfully that O. 3 gives a right to a recognised agent to plead in Court on the appellate side, it is clear that he can have no such right of audience on the original side because of S. 119 which provides that:

" Nothing in this Code shall be deemed to authorise any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its Charter authorised him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys".

The respondent certainly has not been authorised by the High Court to do so. In this connection cls. 9 and 10 of the Letters Patent are important. Cl. 9 relates to the powers of the High Court as to the admission of advocates, vakils and attorneys; and such advocates, vakils and attorneys as have been approved, admitted and enrolled by the High Court are authorised to appear for suitors in the High Court and plead or act for them according as the High Court may by its rules and directions determine and subject to such rules and directions; and cl. 10 gives the High Court power to make rules for the qualifications and admission of proper persons to be advocates, vakils and attorneys, and empowers the High Court to remove or suspend from practice on reasonable cause advocates, vakils or attorneys, and enacts thus:—

" No person whatsoever but such advocates, vakils or attorneys shall be allowed to act or to plead for, or on behalf of any suitor in the said High

1. (1914) 19 C.W.N. 64. 2. (1933) I.L.R. 61 Cal. 324.

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Court, except that any suitors shall be allowed to appear, plead or act on his own behalf or on behalf of a co-suitor".

These two clauses are sufficient to dispose of the respondent's claim and in addition, S. 8 of the Indian Bar Councils Act is equally definite. It is as follows:—

" No person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the advocates of the High Court maintained under this Act:

Provided that nothing in this sub-section shall apply to any attorney of the High Court".

S. 9 empowers the Bar Council with the previous sanction of the High Court to make rules to regulate the admission of persons to be advocates of the High Court. It must be observed that S. 8 is not limited to the right to "plead" but to the right to "practise". The Legal Practitioners Act is similarly decisive as regards the mofussil Courts. The answer to Question No. 1 is so clear that no further reference to statutes or decided cases is necessary and it must be in the negative.

The respondent's contention regarding Question No. 2 is based on the claim that because of his power-of-attorney he stands in the same position as that of an advocate holding a vakalat by reason of O. 39 of the Original Side Rules. R. 1 of that order prohibits a pleader from appearing, pleading or acting in any suit unless he has filed his vakalat in Court in accordance with the rules and his appointment continues under r. 2 until the death of his client or it is revoked under r. 3, which provides that the appointment may be revoked by an order upon a Master's Summons in Chambers. Under r. 2-A if there is already a pleader on record a pleader proposing to file an appointment in the suit may not do so unless he produces the written consent of the pleader on record or unless, where the consent of such pleader is refused, he obtains the special permission of the Court; and r. 5 prevents a party who has filed an appointment of a pleader from appearing before the Court except in the absence of his pleader or to make any application or do any act in person so long as the appointment is in force; and there are similar provisions in the Appellate Side Rules. By reason of these rules the respondent claims that as his power-of-attorney authorising him to appear in Court and plead on behalf of Krishnammal has not been revoked, she is not entitled to give an appointment to Mr. T. R. Srinivasa Aiyangar to act for her. But as an agent under a power-of-

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attorney has no right of audience in Court, it follows that the power-of-attorney authorising him to plead is of no force whatsoever and upon that ground alone his contention must fail. But quite apart from that difficulty, there is no warrant whatever for putting a power-of-attorney given to a recognised agent to conduct proceedings in Court in the same category as a vakalat given to a legal practitioner, though probably the latter may also be described as a power-of-attorney. The very rules upon which the respondent relies show that such a power-of-attorney or appointment as it is called is confined only to pleaders, that is, those who have a right to plead in Courts; and Question No. 2 must, therefore, also be answered in the negative.

Question No. 3 raises some important points and, as it is drafted, does not present any difficulty. Obviously a power-of-attorney agent cannot carry on " Business " as a solicitor or attorney. To carry on business in such capacity is to practise. What exactly the word "practise" used in S. 8 of the Indian Bar Councils Act means is not defined in the Act but it certainly must be taken to mean and include everything that a legal practitioner does as such in the High Court such as Question No. 3 refers to, namely, drafting, engrossing and filing plaints, Judges' summons, affidavits, generally issuing legal process, and although it is not necessary to say what would constitute carrying on a "business", and each case would depend upon its facts, a clear case of it would be where an agent has made a habit of doing so, though even one instance, might be sufficient or if an agent were to take business premises and to hold himself out as a law agent prepared to act in such matters for remuneration. Even one isolated act has, in England, been held to constitute "acting as a solicitor" rendering persons guilty of such conduct liable to be dealt with under S. 26 of the Solicitors Act of 1860 for contempt of Court. (*Ainsworth,* In re: *The Law Society,* Ex parte[1].) In that case, an unqualified person gave as agent for the defendant in an action the notice of appearance to the writ required by O. 12, r. 9, of the Supreme Court Rules, to be given by the defendant to the plaintiff or his solicitor and he was held to be acting in contravention of S. 2 of the Solicitors Act of 1843 which prohibits any unqualified person from "acting as a solicitor"

1. (1905) 2 K.B. 103.

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or "carrying on any proceeding" in the superior Courts. There, the unqualified person does not appear to have done this for remuneration at all and there does not seem to be any reason why even one isolated instance here should not suffice to constitute carrying on business or practising. As it stands, therefore, Question No. 3 has clearly to be answered in the negative also. In conclusion, we would add the following general observations with regard to what the claim put forward by the respondent really amounts to. It is that he should be accorded all the rights and privileges which are enjoyed by members of the legal profession whose qualifications for admission to its ranks are laid down in the rules made by the Bar Council with the sanction of the High Court, and whose professional conduct thereafter is regulated by rules of practise and professional etiquette and who are subject to the disciplinary control of the High Court; whereas the respondent need possess no qualifications whatsoever as regards education and character and is not bound by any rules of professional conduct or etiquette and is not subject to the disciplinary control of the High Court or of any one; and there can be no better example than this case itself affords of the highly objectionable result such a claim may lead to and actually has led to here, because the respondent claims to be remunerated by his principal for his services in question and before us stated that the condition regulating his payment is that he is to receive it only if the result of the proceedings is successful but not otherwise. On his own admission, this is a transaction which, if entered upon by a legal practitioner, would at once render him liable to strong disciplinary action, for to engage in speculative litigation is a grave breach of professional conduct. Yet his claim is that he is free to undertake such business and this is only one example of probable resultant evils.

Reference answered in the negative.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE CORNISH.

M. A. R. R. M. Viswanathan Chettiar .. *Appellant* (Plaintiff)*

v.

Ramanathan Chettiar and others .. *Respondents (Defendants 2 to 4 and nil).*

Viswanathan Chettiar *v.* Ramanathan Chettiar.

Hindu Law—Trading family—Deed of mortgage executed by manager to pay off debts—What lender has to prove—Death of mortgagee before suit—Suit to enforce mortgage by assignee from mortgagee—Contest as to validity of mortgage—Defendants summoned to produce their accounts but failing to do so—Decree on basis of adverse inferences against defendants—Failure of plaintiff to adduce evidence if material.

Where there is a joint family business the manager has authority to raise money not only for the payment of debts but also for the purpose of carrying on the business. Where the deed of mortgage executed by the manager of a trading family recites that the amount was borrowed for the purpose of paying off the trade debts of the family, the lender discharges the duty by showing that there were in fact trade debts in existence, that is to say, that the debt had been incurred in the course and for purposes of the trade. There his duty ends, and he is not bound to prove further that in the incurring of the debts the manager had acted prudently; nor is he required to prove that the debts could not have been discharged otherwise than by borrowing the amount from him.

Mayne's Hindu Law, 9th Edition, pp. 398 and 399 and *Niamat Rai* v. *Din Dayal*, (1927) 52 M.L.J. 729: L.R. 54 I.A. 211: I.L.R. 8 Lah. 597 (P.C.), relied on.

Where in the case of a trading family a certain sum of money was advanced on mortgage to the manager for the purpose of paying off certain trade debts of the family, and the mortgagee having died subsequently, an assignee from him instituted a suit on the mortgage and the other members of the family contested the alienation, and thereupon the plaintiff applied to the Court that the defendants might be directed to make discovery of their account books but the first defendant, who was the manager and the executant of the mortgage, stated that the books had been deposited with certain persons and that he did not know what had happened to them, and though the plaintiff again took out a subpoena against the first defendant for the production of the account books at the hearing the accounts were not produced and the defendants also did not go into the witness-box.

Held, that the circumstances indicated that the defendants deliberately withheld from the Court evidence bearing on the question which was particularly within their knowledge, that it was proper for the Court to draw adverse inferences against them, and that the existence of the debts which had been discharged, having been either admitted or not denied by the parties, the Court could decree the claim of the plaintiff, even though no evidence had been adduced on his behalf as to the existence of those debts.

* Appeal No. 190 of 1931. 20th April, 1937.

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Guruswami Nadar v. *Gopalaswami Odayar*, (1919) 36 M.L.J. 568: I.L.R. 42 Mad. 629, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Devakotta in O. S. No. 29 of 1927.

V. Radhakrishnayya, V. Rajagopala Aiyar and *T. V. Ramiah* for Appellant.

M. Patanjali Sastri, R. Kesava Aiyangar and *R. Swaminatha Aiyar* for Respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—The question which this appeal raises is whether the mortgage debt is binding upon defendants 2, 3 and 4. The actual executant of the said bond was the first defendant, but he purports to have executed it not only on his own behalf but also as the "family manager and guardian of his undivided younger brother", the second defendant, who was then a minor. All the defendants resisted the claim, even the receipt of the consideration having been denied by the first defendant. There was a further allegation that so far as defendants 2 to 4 were concerned the debt was not incurred for a purpose binding upon the joint family. The learned trial judge has come to the conclusion that consideration was paid, with which we unhesitatingly concur. The facts may be shortly stated. A person by name Chockalinga had three daughters by his first wife but no male issue. Thereupon he adopted the first defendant as his son. Subsequently he married a second wife and the second defendant was his son by her. Egappa Chetty the mortgagee is the husband of one of Chockalinga's daughters by his first wife. The mortgage was granted in December, 1916, and it was assigned to the plaintiff, a relation of the parties, in January, 1924. Egappa died about the year 1926. The suit was filed in 1927 and was heard in 1930. Chockalinga was carrying on a family trade, which upon his death devolved upon his sons, and it is not disputed that on the date of the mortgage bond, the first defendant was conducting a family trade at two centres, namely, Devakottah and Colombo. There is a recital in the deed to the effect that the amount mentioned as the consideration, namely, Rs. 5,000, was borrowed for the purpose of discharging the debt due by the family firm at Colombo. At the trial the account books of Egappa were produced which show that the amount was paid to the first defendant by mesne profits of a hundi. Both the 1st

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and the second defendants were debited with Rs. 5,000, the drawee of the hundi having been credited with a like sum. The entries were made on the 15th January, 1917, the date on which the deed was registered and the credit entry recites that the drawee is entitled to interest from the 22nd December, 1916, the date of the mortgage bond. There is absolutely no ground shown for discrediting the accounts, and we must as already stated, hold that the lower Court's conclusion on this point is perfectly correct.

The learned trial Judge, however, has held that it has not been shown that the debt is binding upon the other defendants, and it is this finding that the plaintiff as the appellant here attacks. According to the recital in the deed, the amount was borrowed for the purpose of paying off the trade debts of the family. The question that arises is, whether that recital is true; for, in the case of a trading family the lender is not called on to prove more than that such debts did in fact exist. What is a necessary or beneficial purpose is a question which, in the case of a trading family, is governed by considerations different from those that apply to an ordinary Hindu coparcenary. The lender discharges his duty by showing that there were in fact trade debts in existence, that is to say, that the debts had been incurred in the course of or for purposes of the trade. There his duty ends and he is not called on to prove further that in the incurring of the debts the manager had acted prudently; nor is he required to prove that the debts could have been discharged otherwise than by borrowing the amount from him. To hold differently would be to throw upon the lender a duty so onerous that no ordinary man can be expected to perform adequately. Moreover, it would neither be reasonable nor in the interests of the borrowing family itself to require the lender to make an investigation and ascertain whether the manager could have carried on the trade more advantageously by pursuing a different course. As Mayne observes in his Hindu Law it is the same fundamental principle that is applied both in the case of a trading family and a non-trading family. Only in the application of the principle the considerations that are to be borne in mind are different. The incurring of debts is a necessity to a trading family, while it would not be to a non-trading family. Therefore it follows:

" Even where the debts in fact are incurred merely for the personal purposes of the manager, they will bind the family if they are within the osten-

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sible authority of the manager as conducting the family business. So it is that those that deal with him and to whom he incurs debts are not put upon inquiry as to whether the debts were incurred for the benefit of necessities of the family, so long as they are incidental to the family business." (Mayne's Hindu Law, 9th Ed., pp. 398 and 399.)

With this statement of the law we entirely agree. Indeed, whatever doubts might have been once entertained on this question the point now seems concluded by authority. Their Lordships of the Judicial Committee point out that where there is a joint family business, the manager has authority to raise money not only for the payment of debts but also for the purpose of carrying on the business. It might be argued that it would be better to close down the business than to raise more money to carry it on. Their Lordships refute such an argument and declare that it would be unreasonable to require a lender or purchaser to go into questions of this kind as to which he would rarely be in a position to form a sound opinion. (*Niamat Rai* v. *Din Dayal*[1].)

This being the correct view, the question that arises is as already stated, whether the recital in the mortgage deed is true, in other words, whether in point of fact there were trade debts to be discharged. Let us now turn to the written statement of the first defendant who making common cause with the second resisted the plaintiff's suit. He admits categorically that in the ancestral trade which he was conducting there were debts amounting to Rs. 5,000 or Rs. 6,000 which remained to be discharged on the date of the bond. He admits again that for the purpose of discharging those debts, the suit bond was executed, but goes on to say that for certain reasons the consideration was not actually received and that he was therefore obliged to utilise other monies for satisfying the debts. As regards this non-receipt of the consideration this case has been, as already stated, rightly disbelieved. So much for the first defendant's written statement. Now turning to the statement filed by the second defendant there is no suggestion made anywhere that there were no debts in existence. On the contrary he asserts:

"No portion of the consideration of the suit bond was utilised for discharging the debts due by the said firm"

Thereby implying that there were debts which had to be paid off. (*See also* another allegation to the same effect in paragraph 13.)

1. (1927) 52 M.L.J. 729: L.R. 54 I.A. 211: I.L.R. 8 Lah. 597 (P.C.).

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Egappa, as already stated, had died before the date of the suit. The plaintiff, with a view to prove that there were debts in existence, applied to the Court that defendants 1 and 2 should be directed to make discovery of their account books. His application was granted by the lower Court. And what is the result? The first defendant filed an affidavit stating that at some time (when, it is not stated) the account books had been deposited with some persons and that he was not aware as to what had since happened to them. This is a most incredible statement to make, and so far as the second defendant is concerned, he was content with saying that he never had in his control any account books whatsoever. This happened more than two years previous to the trial, but the matter does not stop there. The plaintiff took out a subpœna against the first defendant for the production of the account books at the hearing and to this again he paid no heed; and the lower Court properly remarks that every presumption should be drawn against him from this suppression of material evidence. Then again, there is the further fact, that neither the first defendant nor the second defendant has chosen to go into the witness-box. From these circumstances which show that the defendants deliberately withheld from the Court the evidence bearing on this question which was peculiarly within their own knowledge, the inference is irresistible, that had it been produced, it would have been fatal to their case. *Guruswami Nadar* v. *Gopalaswami Odayar*[1] decided by Sir John Wallis, C. J. and Ayling, J., on which Mr. Radhakrishnayya for the plaintiff relies bears a very close resemblance, to the facts of the present case. There, as here, the lender was dead; the defendants failed to produce their books and abstained from going into the box. Wallis, C.J., observed, relying upon the decision of the Judicial Committee reported in *Murugesam Pillai* v. *Manickavasaka Desika Gnana Sambandha Pandara Sannadhi*[2] that the defendants were not entitled to lie by, trusting to the abstract doctrine of onus of proof and if they did so, the Court would rightly draw an adverse inference against them. Then the learned Chief Justice goes on to say (and this is a very important observation) that the Court would find against the defendants *even though no evidence* was

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1. (1919) 36 M.L.J. 568: I.L.R. 42 Mad. 629.
2. (1917) 32 M.L.J. 369: L.R. 44 I.A. 98: I.L.R. 40 Mad. 402 (P.C.).

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adduced on behalf of the plaintiffs (*Ibid.*, p. 629). Turning to the present case, we have already referred to the first defendant's written statement where the existence of the debts was expressly admitted and to the second defendant's statement where, to say the least, there was no denial of that fact. The only witness examined for the defence was obliged to depose that the first defendant was saying that there were debts. On the whole it seems to us that the 'proper inference to make is that the existences of the debts has been made out. We may observe that the question does not depend upon the credibility of the witnesses, in which case the lower Court's opinion would have been entitled to great weight, but upon the correct principles to be applied. We have therefore no hesitation in coming to conclusion that the lower Court's decision is wrong.

Mr. Radhakrishnayya contends in the alternative that granting that the existence of the trade debts has not been proved, the plaintiff would still be entitled to a decree against defendants 2 to 4. He argues that we must hold on the evidence, first, that there was a representation by the first defendant that there were trade debts to discharge and, secondly, that Egappa satisfied himself after due enquiry, that the representation was true and acted upon it. That the representation was made to Egappa there can be no doubt, as apart from what P.W. 3 says, the recital in the deed is the best evidence of it. Then Mr. Radhakrishnayya puts his argument thus: The mortgagee who could have satisfied the Court as to the enquiries made, is dead; moreover he was the only person who could have told the Court whether any independent evidence was available. Therefore he contends that the rule applicable to ancient transactions, *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri*[1], *Chintamani Bhatla Venkata Reddi Pantulu* v. *Rani Saheba of Wadhwan*[2], *Somayya* v. *Venkayya*[3], *Kumaraswami Mudaliar* v. *Narayanaswami*[4] and *Aukula Sanyasi* v. *Ramachandra Rao*[5] should be applied here although the suit mortgage cannot be strictly described as old for according to him the principle underlying the rule is equally applicable to such transactions as the present one.

1. (1916) 31 M.L.J. 563: L.R. 43 I.A. 249: I.L.R. 44 Cal. 186 (P.C.).
2. (1919) 38 M.L.J. 393: L.R. 47 I.A. 6: I.L.R. 43 Mad. 541 (P.C.).
3. (1924) 48 M.L.J. 224.
4. (1932) 36 L.W. 186.
5. (1926) 51 M.L.J. 73.

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Mr. Radhakrishnayya's argument is, that the circumstances of the case are such, as to warrant the inference that the enquiry was in all probability made, and that the result of it was, that the lender was reasonably satisfied that the representation made to him was true. We do not think it is necessary, in view of the conclusion at which we have already arrived, to deal with this alternative contention.

In the result, the appeal is allowed and a mortgage decree is granted against the interests of all the defendants in the mortgaged property. Time for payment is extended by three months from to-day. The lower Court's order directing the plaintiff to pay the costs of defendants 2 to 4 is set aside. The plaintiff will get his costs both here and in the Court below from all the defendants.

B. V. V. —— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD BLANESBURGH, LORD ALNESS AND SIR JOHN WALLIS.

Musammat Fatima Begum .. *Appellant**

v.

Ahmad Ali Khan and another .. *Respondents.*

P. C.

Mt. Fatima Begum *v.* Ahmad Ali Khan.

Deed—Construction—Marriage contract between Mahomedans—Agreement to pay dower—Provision for monthly payment on variance between spouses—Liability of surety specified—General liability for entire debt on death of husband—Whether inferable.

A marriage contract between Mahomedans was signed by the husband and by his cousin *A*, who was described as surety. The deed after setting out the *factum* of marriage and the dower agreed upon provided (1) that in the unhappy event of "variance" between the parties to the marriage the husband should pay his wife Rs. 60 per month; (2) that *A* should pay Rs. 60 a month to the wife while the marriage subsisted; and (3) that certain other person should transfer a portion of her pension to the wife. After that there was the following declaration: "It is declared that both the aforesaid dowers are payable in full by the man marrying as all due debts are, that he should pay the same without any deductions at the time they fall due and that the girl married is entitled to recover the same from her husband and the surety." Then followed a postscript to the deed remitting a portion of the dower and stating that "the remaining amount stands as a right, payable debt due from the man marrying." The husband having died the wife sought to enforce the claim for dower against the surety. The plaintiff placed reliance on the following provision in the earlier part of the marriage contract: "Just as payment of the dowers of both kinds, that is, prompt and deferred, is

* P. C. Appeal No. 92 of 1935. 19th February, 1937.

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essential and compulsory, so it is incumbent on the surety to pay the said amount every month".

Held, on a construction of the marriage contract, that the only liability taken up by the surety was for payment to the wife of Rs. 60 a month throughout the married life of the parties and that there was no general liability on the part of the surety for the entire dower debt.

Decision of the Lahore High Court affirmed.

Appeal from a decree of the High Court of Judicature at Lahore dated 15th January, 1934, which modified and reversed a decree of the Senior Subordinate Judge of Ludhiana, dated 19th March, 1928.

A. Majid for Appellant.

J. Chinna Durai for Respondents.

19th February, 1937. Their Lordships' judgment was delivered by

Lord Alness.

LORD ALNESS.—This is an appeal from a decree of the High Court of Judicature at Lahore, dated the 15th January, 1934, which modified and reversed a decree of the Senior Subordinate Judge of Ludhiana, dated 19th March, 1928. The appeal arises out of a suit for recovery of a dower. The principal question in issue is whether the respondents, as legal representatives of one Aftab Ali Khan, who is dead, are bound to pay a dower now aggregating Rs. 36,000. The claim involves that Aftab Ali Khan was liable as a surety to pay the dower, and that his liability was transmitted on his death to the respondents.

The Trial Judge held that Aftab Ali Khan was liable to the plaintiff for payment of the dower, and accordingly passed a decree to that effect. The High Court at Lahore, on appeal, held that Aftab Ali Khan was not liable as a surety in respect of the dower. Certain other questions were dealt with in the judgments of both Courts in India, but they are no longer in issue between the parties, and need not be further referred to. Against the decree of the High Court so far as it exonerated Aftab Ali Khan and his estate from liability in respect of the dower in question, the present appeal is taken.

The facts which gave rise to the issue which now falls to be determined by the Board are as follow: On 25th April, 1903, Musammat Fatima Begum, the appellant, was married to one Nawab Samiullah Khan, and on that date a deed of marriage contract was drawn up. It was signed, *inter alios*, by Samiullah Khan, and by Aftab Ali Khan, his cousin. On

25th April, 1923, Nawab Samiullah Khan died. On 12th April, 1926, the plaintiff brought the present suit, alleging that Aftab Ali Khan under the deed stood surety for payment of a dower then aggregating Rs. 36,000. Other parties were also called as defendants, but Aftab Ali Khan alone defended the suit. In his written statement he denied liability to pay the sum sued for.

In the Trial Court eight issues were framed by the learned Senior Subordinate Judge, of which only one—namely, the sixth—is now material. That issue was in these terms: "Did not defendant Aftab Ali Khan stand surety for the payment of the dower?" The learned Judge, on 19th March, 1928, decided that issue in favour of the plaintiff, and, as already stated, a decree to that effect was accordingly made. From that judgment and decree the present respondents, who are the legal representatives of Aftab Ali Khan, by this time deceased, appealed to the High Court of Judicature at Lahore, which on 15th January, 1934, reversed the decree of the Trial Court, in so far as it was directed against Aftab Ali Khan as a surety. Against that decree the plaintiff obtained leave to appeal to His Majesty in Council, and her counsel has now been fully heard. In the result their Lordships are satisfied that the judgment of the High Court was in the above respect well founded, and should be affirmed.

The decision of the question at issue between the parties turns upon the true construction of the marriage contract already referred to. Was Aftab Ali Khan bound under that deed as a surety to pay the dower, or was he not? That is the issue. In determining it their Lordships at once turn to the official translation of the marriage contract, to which alone, they apprehend, they can have regard. It is not a well drawn deed, but the scheme which it was intended to embody is not obscure. After setting out the *factum* of the marriage and its celebration, and mentioning that Nawab Samiullah Khan had accepted his liability to pay Rs. 17,000 as prompt and Rs. 34,000 as deferred dower, the deed provides (1) that, in the unhappy event of "variance" between the parties to the marriage, the husband should pay his wife Rs. 60 per month; (2) that Aftab Ali Khan should pay Rs. 60 a month to the wife while the marriage subsisted; (3) that one Bi Masitan should transfer Rs. 30 of her pension to the appellant. Then followed a

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declaration, which is of the nature of a "summing up" of the preceding provisions, and on which alone in India the plaintiff's counsel based her claim. It may, in these circumstances, be desirable to set out at length the terms of this part of this declaration. It is as follows:—"It is declared that both the aforesaid dowers, that is, the prompt and the deferred, are payable in full by the man marrying as all due debts are, that he should pay the same without any deductions at the time they fall due, and that the girl married is entitled to recover the same from her husband and the surety." Special reliance was placed by the appellant upon the last three words of the declaration, namely, "and the surety." Then followed a post-script to the deed in these terms: "The Vakil of the girl married remitted Rs. 15,000 out of the two dowers, and the remaining amount stands as a right, payable debt due from the man marrying."

Thus is the Rs. 36,000 in suit ascertained.

Within the four corners of the deed so described, their Lordships, like the High Court at Lahore, are unable to find any definite or unequivocal undertaking on the part of Aftab Ali Khan to pay the dower in question. There can be no doubt, and indeed it was ultimately conceded by the appellant's counsel, that, if he is to succeed in the appeal, the *onus* rests on him of demonstrating beyond reasonable doubt the existence of such an undertaking in the deed. Their Lordships are of opinion that he has failed to do this.

The appellant's counsel placed reliance on a phrase in the earlier part of the marriage contract which reads "just as payment of the dowers of both kinds, that is, prompt and deferred, is essential and compulsory, so is it incumbent on the surety to pay the said amount every month." These words are quite inadequate, in their Lordships' view, to serve the purpose contended for by the appellant in argument. Having regard to the language employed and to its situation in the deed, the words quoted merely provide, what is not in doubt, that the surety is liable to pay the wife Rs. 60 a month throughout the married life of the parties.

With regard to the words "and the surety" quoted *supra*, it must be remembered that they occur, as their Lordships have already indicated, in the "summing up" clause in the deed, where one would not expect to find a fresh and substantive

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obligation on the part of the surety to pay the dower, and which, in truth, as the High Court pointed out, is expressed "in a somewhat cursory manner." Their Lordships feel free to interpret that part of the deed as meaning that it is just as incumbent on the surety to pay what he has undertaken as it is on the husband to pay what he has undertaken.

Their Lordships' opinion regarding the true construction of the deed is reinforced by the consideration that, when one has regard to the postscript, which may be taken as embodying the last words of the parties on the subject-matter of the contract, the liability of the husband is expressed, but the liability of the surety is not referred to. Nor can it be ignored that it is in this postscript that the liability for a sum of Rs. 36,000 now in suit is in terms defined.

Their Lordships base their decision on the simple view that, the *onus* being on the plaintiff to establish the liability of Aftab Ali Khan under the deed to pay this Rs. 36,000, she has, in their Lordships' judgment, *upon a careful review of the provisions of the deed,* failed to discharge that *onus.* Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed, and that the decree of the High Court at Lahore should be affirmed. The appellant will pay the costs of the appeal.

Solicitors for Appellant: *Francis & Harker.*

Solicitors for Respondents: *Douglas Grant & Dold.*

R. C. C. ——— *Appeal dismissed.*

B. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice.*

C. S. Mahadeva Aiyar .. *Petitioner* (Defendant)*

v.

The Municipal Council, Masulipatam, represented by the Commissioner, Masulipatam .. *Respondent (Plaintiff).*

Mahadeva Aiyar *v.* Municipal Council, Masulipatam.

Madras District Municipalities Act (V of 1920 as amended), S. 93 and Sch. IV, r. 17—"Holds any appointment"—District Judge on leave—Residence outside municipal limits—Liability for profession-tax—Provision for levy of profession-tax—Strict construction.

The petitioner was appointed District Judge of Kistna with headquarters at Masulipatam on 1st April, 1931. The Court closed for the vacation on the

* C. R. P. No. 1169 of 1935. 6th August, 1937.

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4th May, 1931, and reopened on 6th July, 1931. The petitioner, who was granted leave on average pay from 6th July to 30th July, 1931, with liberty to prefix the period of the vacation, left Masulipatam on the closing of the Court but he remained the District Judge of the place until 31st July, 1931, when he retired. During the time the petitioner was on leave the Government appointed an Additional Sessions Judge with headquarters at a different place within the District to deal with criminal cases. The petitioner was assessed to profession-tax by the Municipal Council of Masulipatam under S. 93 of the Madras District Municipalities Act.

Held, that the petitioner was not liable for the profession-tax levied by the Municipal Council as he neither resided within the municipal limits nor held the appointment of District Judge within the municipal limits for a period of sixty days. The petitioner could not be deemed to have held an office at Masulipatam during the period that he was on leave and the mere fact that he performed certain administrative acts after he left the place would not alter his position.

Scope of S. 93 of the Madras District Municipalities Act and r. 17 of the Rules under Sch. IV of the Act considered.

Chairman, Ongole Municipality v. *Mounsey*, (1894) I.L.R. 17 Mad. 453; *Hammick* v. *President, Madras Municipal Commission*, (1898) 8 M.L.J. 164: I.L.R. 22 Mad. 145 and *Henry Moberly* v. *The Municipal Council of Cuddalore*, (1914) I.L.R. 38 Mad. 879, relied on.

The provision as to levy of profession-tax contained in S. 93 of the Madras District Municipalities Act is a taxing provision and must be construed strictly. Before a person can be made liable for the tax imposed on him it must be clearly shown that he comes within the four corners of the section.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Masulipatam in S. C. S. No. 850 of 1934.

R. Swaminatha Aiyar for Petitioner.

V. Govindarajachari for Respondent.

The Court delivered the following

JUDGMENT.—This petition raises the question whether the petitioner who in 1931 was the District Judge of Kistna with headquarters at Masulipatam is liable to the Municipal Council of Masulipatam in the sum of Rs. 93-10-0 by way of profession tax. The petitioner was appointed the District Judge of Kistna on the 1st April, 1931. The Court closed for the vacation on the 4th May, 1931, and the petitioner left Masulipatam never to return, although he remained the District Judge of Kistna until the 31st July, 1931, when he retired. The Court reopened after the vacation on the 6th July, 1931. On the 22nd April, 1931, that is, before the Court closed for the vacation, the Government of Madras granted to the petitioner leave on average pay from the 6th July to the 30th July, with permission

to prefix the period of the vacation. By the same order the Government appointed an Additional Sessions Judge with headquarters at Ellore in order that criminal cases could be dealt with in the meantime. The petitioner was actually in Masulipatam from the 1st April, 1931, to 4th May, 1931, and therefore was not there for a period of sixty days. S. 93 of the Madras District Municipalities Act, 1920, as amended by the Act of 1930, states that if the Council by a resolution determines that a profession tax shall be levied (and this resolution has been passed) every person who in any half year (*a*) exercises a profession, art or calling or transacts business or holds any appointment, public or private (*i*) within the municipality for not less than sixty days in the aggregate, or (*ii*) without the municipality but who resides in the municipality for not less than sixty days in the aggregate, or (*b*) resides in the municipality for not less than sixty days in the aggregate and is in receipt of any pension or income from investments, shall pay a half-yearly tax assessed in accordance with the rules in Schedule IV of the Act. The question to be decided is whether the petitioner held his appointment within the meaning of the section for the period requisite to make him chargeable. The District Munsif has held that the petitioner does come within the section and relies for this decision on r. 17 of the Rules to be found in the Fourth Schedule to the Act. Rule 17 says that a person shall be deemed to have exercised a profession, art or calling or held an appointment within a municipality if he has an office or place of business within such municipality. The learned District Munsif was of the opinion that the petitioner had an office within the municipal area notwithstanding that he was on leave.

Before discussing the correctness of this decision I would refer to three decisions, two of which refers to the Madras District Municipalities Act of 1884 and the other to the Madras City Municipal Act of the same year. S. 53 of the former Act provided that:

"If the Municipal Council notify under S. 50, that a tax on arts, professions, trades and callings, and on offices or appointments shall be levied, every person who, within the Municipality, exercises, after the date specified in the said notification, any one or more of the arts, professions, trades or callings, or holds any one or more of the offices or appointments, specified in Sch. A shall, subject to the provisions of S. 59, pay in respect thereof the sum specified in the said schedule as payable by persons of the class in which such person is placed".

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The City of Madras Municipal Act, 1884, was to the same effect.

In *Chairman, Ongole Municipality* v. *Mounsey*[1], it was held that an officer, whose headquarters are within a municipality, does not *ipso facto* exercise his profession or hold such office or appointment within the municipality so as to render himself liable for the payment of profession tax. Accordingly an officer who was not personally present at his headquarters in the course of duty for a period of sixty days in the half-year was not liable for the tax. The reason for the decision was that it was an essential condition of liability that the profession should be exercised within municipal limits. In *Henry Moberly* v. *The Municipal Council of Cuddalore*[2], it was found that a District Judge whose usual place of business was within the Municipality of Cuddalore had resided for sixty days within another Municipality during the annual recess and during that period had done some administrative but no judicial work, and it was held that he was not liable to payment of profession tax to the Cuddalore Municipality. It was said that he must be deemed to have held his office of District Judge within the Kodaikanal Municipality, where he spent his vacation and not at Cuddalore. The case of *Hammick* v. *President, Madras Municipal Commission*[3], was under the City of Madras Municipal Act. The Inspector-General of Police, whose official place of business was in Madras, went on tour, and during his absence the Assistant Inspector-General of Police in Madras signed letters for him. It was decided that in these circumstances he was not liable to the profession tax under the City Act, as he was not holding the office in Madras within the meaning of the statute.

S. 93 of the Madras District Municipalities Act of 1920 as amended by the Act of 1930, has been differently arranged, but the re-arrangement in my opinion does not alter the section and the authorities to which I have just referred would have application if the matter rested there. R. 17 of the Statutory Rules does, however, make a difference. Under that rule a person is to be deemed to hold an office within a municipality if he has an office within the municipality and it matters not whether he goes outside or remains inside the municipal limits.

1. (1894) I.L.R. 17 Mad. 453. 2. (1914) I.L.R. 38 Mad. 879.
3. (1898) 8 M.L.J. 164: I.L.R. 22 Mad. 145.

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Therefore what I have to decide in this case is whether the petitioner must be deemed to have had an office in Masulipatam from the 4th May, 1931, to the end of July of that year. It is quite clear that he was holding the office of District Judge during this period, but it does not necessarily follow that he had still got an office. The Court room was still there and so was the office room attached to it, but can that room be regarded as a place of business or an office of the petitioner? I consider that it cannot. The petitioner left Masulipatam on the 4th May, 1931, never to return again. He knew that he was retiring at the end of July and before he left he had arranged for leave to be granted to him for the period between the end of the vacation and the date on which he was leaving the service. Under r. 72 of the Fundamental Rules he could not return to Masulipatam to act as District Judge even if he wanted to before the expiration of the period of the leave, without the express sanction of the Government. His work had finished and he was allowed to spend the remaining days of his service elsewhere. I am asked to hold that he had an office because he passed an order appointing a record keeper and other junior officials after he had left Masulipatam. These were administrative acts which he was bound to perform and which required no office so far as he was concerned. The Madras District Municipalities Act in this respect is a taxing statute, and must be construed strictly. Before the petitioner can be made liable to the tax imposed upon him it must be clearly shown that he comes within the four corners of the section. I am of opinion that on a true construction of the section he is not within its purview.

For these reasons the petitioner succeeds and his petition must be allowed with costs throughout.

B. V. V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Peravalli Kotayya and others .. *Petitioners** (*Defendants*)

v.

Ponnapalli Ramakrishnayya and others .. *Respondents* (*Plaintiffs*).

Kotayya v. Ramakrishnayya.

Madras Estates Land Act (I of 1908), Ss. 6 and 8—Estates Land (Amendment) Act (XVIII of 1936), Ss. 3 and 13—If confers occupancy rights

* C. R. P. Nos. 971 to 992 of 1934. 4th January, 1937.

Kotayya v. Rama-krishnayya.

on persons in possession even in pending suits—Applicability of S. 13—Meaning of S. 127 (2) of Act VIII of 1934—Acquisition of kudiwaram under exception to S. 8—Evidence of acquisition over each plot necessary and not general evidence regarding whole village.

The Agraharamdars of *A* filed suits against the tenants for recovery of rents or damages for use and occupation in respect of the holdings in their occupation in 1918, on the allegation that the Agraharamdars own both the melwaram and the kudiwaram by virtue of the original grant or by acquisition of the kudiwaram subsequent to the grant under exception to S. 8. The defence was that the Agraharam was an 'estate'. The District Court held that the Agraharamdars had acquired the kudiwaram interest and that the defendants had no occupancy right. As against that revisions were filed to the High Court in 1934.

Held, that whatever the merits of the case may be, the defendants have acquired occupancy rights by virtue of S. 3 of Madras Act (XVIII of 1936) read with S. 6 of the Madras Estates Land Act (I of 1908). S. 3 is *prima facie* retrospective and there is no saving in regard to pending suits. If on 30th June, 1934, a tenant is in possession of land in an inam village which ceased to be part of the estate he will get occupancy right by virtue of S. 6 (1). The applicability of S. 3 is not controlled or governed by S. 13 of the Amendment Act (XVIII of 1936), as apart from S. 13, S. 3 will apply to the cases.

K. C. Mukerjee v. *Mt. Ram Ratan Kuer,* (1935) 70 M.L.J. 105: L.R. 63 I.A. 47: I.L.R. 15 Pat. 268 (P.C.), applied.

Madras Amending Act (XVIII of 1936) is not limited to pending suits which are stayed under S. 127 (2) of the Madras Estates Land (Amendment) Act of 1934 nor is S. 127 (2) confined to cases where land is comprised in a village which is not an estate within the meaning of S. 3 (2) (*d*). The words 'not being an estate' qualifies the word 'land' and not only village in cl. (2) of S. 127 of Madras Act (VIII of 1934). To hold otherwise would mean that the Court must in every case come to the conclusion whether it is an estate or not before the amendment can be applied, which will be frustrating the object of the legislature.

Held, further, on the merits that if a landholder wants to rely on the exception to S. 8 of the Act, it is incumbent on him to prove that in a particular plot of land he acquired the kudiwaram.

Effect of Dumbalas discussed.

Nature of evidence for establishing occupancy rights, etc., pointed out.

Petitions under S. 115 of Act V of 1908, praying the High Court to revise the decrees of the District Court of Guntur in C. M. A. Nos. 89, etc., of 1931, respectively, preferred against the decrees of the Court of the District Munsiff of Repalle in O. S. Nos. 34 of 1928, etc., respectively.

P. Satyanarayana Rao for Petitioners.

B. Somayya, G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondents.

The Court delivered the following

JUDGMENT.—These civil revision petitions arise out of a batch of suits instituted by the Agraharamdars of Arepalli

Taluk, Guntur District, against the tenants for recovery of rents or damages for use and occupation in respect of the holdings in their occupation. All the suits excepting one, namely, O. S. No. 153 of 1918 were filed in the District Munsiff's Court of Repalli. The said O. S. No. 153 of 1918 was filed in the District Munsiff's Court of Tenali.

The main question in these suits is whether the Civil Court or the Revenue Court has jurisdiction to take cognisance of them. The allegations in the plaints are that the Agraharamdars own both the melwaram and the kudiwaram by virtue of the original grant and that at no time the tenants had occupancy rights. The plea of the tenants is that Arepalli Agraharam is an estate within the meaning of the Estates Land Act and their holdings being comprised in the said estate, the Revenue Court only has got jurisdiction to determine the claims. All the suits which were filed in the Repalli District Munsiff's Court were stayed pending the decision of the Privy Council relating to certain lands in the same agraharam wherein the same question was raised. The said O. S. No. 153 of 1918 reached the stage of second appeal and was pending in the High Court. The decision of the Privy Council was delivered on 14th February, 1929, and is reported in *Seethayya* v. *Subramania Somayajulu*[1]. On a consideration of the original grant, their Lordships of the Judicial Committee held that the Arepalli Agraharam was an estate within the meaning of S. 3, cl. 2 (*d*) of the Madras Estates Land Act. After the decision of the Privy Council the suits in the District Munsiff's Court of Repalli were taken up for hearing and the plaints were directed to be returned for presentation to the proper Revenue Court. There was an appeal to the District Court from this decision. The learned District Judge was of opinion that though on the question of the construction of the grant the Privy Council decision was conclusive of the rights of the parties, the plaintiffs will nevertheless be entitled to allege and prove that they had acquired the kudiwaram right in the said lands subsequent to the date of grant. He therefore permitted the said contention to be raised and remanded the suits for disposal in the light of the observations contained in his judgment. It may be noticed the same view was taken in S. A. No. 1088 of 1921 which was filed against the appellate decision

1. (1929) 56 M.L.J. 730: L.R. 56 I.A. 146: I.L.R. 52 Mad. 453 (P.C.).

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in O. S. No. 153 of 1918 and the said suit was also remanded for a like purpose. The District Munsiff on remand in a very careful and considered judgment came to the conclusion that the Agraharamdars did not acquire kudiwaram interest subsequent to the grant and the Revenue Court alone had jurisdiction. But his decision was reversed by the learned District Judge. It is against his decision these revision petitions were preferred in 22 of the suits. Since the filing of these revision petitions it has been brought to my notice that 10 of them have been compromised, namely, the following C. R. P. Nos. 971, 973, 979, 980, 982, 988, 989, 990, 991 and 992 of 1934. Therefore the main question which falls to be decided is whether the Agraharamdars own both the warams by reason of the subsequent acquisition of kudiwaram and the Civil Court has jurisdiction to try the suits. Mr. Satyanarayana Rao who appeared for the petitioners urged that it is unnecessary to go into the merits of these cases on the ground that under the Madras Act (XVIII of 1936) which amended the Madras Estates Land Act they have acquired occupancy rights and the kudiwaram is no longer in the Agraharamdars and the Revenue Court alone has got jurisdiction. It seems to me that this contention must prevail. S. 3 of the said Act has now added the following explanation to S. 6 of the Madras Estates Land Act (I of 1908):

"In relation to any inam village which was not an estate before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, but became an estate by virtue of that Act, or in relation to any land in an inam village which ceased to be part of an estate before the commencement of that Act, the expressions 'now' and 'commencement of this Act' in this sub-section and Explanation (1) shall be construed as meaning the thirtieth day of June, 1934, and the expression 'hereafter' in this sub-section shall be construed as meaning the period after the thirtieth day of June, 1934."

So far as S. 6 of the Act is concerned, it has been held to be retrospective in this sense, namely, that on the date of the commencement of the Act if a tenant was in possession of ryoti land, he would acquire occupancy right and the section has been applied to pending litigations where decrees in ejectments had been obtained but no final decree of a competent Court had been passed. In the order of the Reference to the Full Bench in *Kanakayya* v. *Janardhana Padhi*[1], Miller and Krishnaswamy Ayyar, JJ., made the following observations in

1. (1910) 21 M.L.J. 31: I.L.R. 36 Mad. 439 (F.B.):

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regard to the expression 'every ryot now in possession' in the section:

It says "the expression 'every ryot now in possession' shall include every person who continues in possession at the commencement of this Act". It seems impossible to resist the conclusion that it was the deliberate intention of the legislature to confer a right of occupancy upon a ryot in possession at the date of the commencement of the Act. Such an interpretation may have the effect of nullifying vested rights under contracts previously entered into. But it is impossible to place the interpretation that ryots in possession of land at the date of the commencement of the Act are entitled to occupancy rights on the mere general principle that a legislative enactment should not be interpreted so as to affect vested rights or to give it retrospective operation by applying it to pending suits. As pointed out by Bowen, L.J., "no doubt, as a general rule, a statute does not affect pending proceedings, but that rule is only a guide where the intention of the legislature is obscure; it does not modify the clear words of a statute". (*Quilter* v. *Mapleson*[1].)

The same view was taken in *Govinda Parama Guruvu* v. *Dandasi Pradhanu*[2] where before the 1st July, 1908, the date when the Act came into force, the landlord obtained a decree for possession of the ryoti land. Benson and Sankaran Nair, JJ., held it was immaterial that a decree for possession had been already passed. This interpretation was accepted by the Privy Council in *Yerlagadda Mallikharjuna Prasad* v. *Somayya*[3]. Now by virtue of the amendment made by S. 3 of the Amending Act in relation to any inam village which ceased to be part of an estate before the commencement of the Amending Act, the expressions 'now' and 'commencement of this Act' in this sub-section and explanation 1 shall be construed as meaning the thirtieth day of June, 1934. This section is *prima facie* retrospective and there is no saving in regard to pending suits. If on the 30th day of June, 1934, a tenant is in possession of land in an inam village which ceased to be part of the estate, he will get occupancy right by virtue of S. 6 (1). Assuming therefore the contention of the Agraharamdars is right that the land ceased to be part of an estate, the petitioners have acquired occupancy rights and they are still in possession. I may usefully refer in this connection to the recent decision of the Privy Council reported in *K. C. Mukerjee* v. *Mt. Ram Ratan Kuer*[4]. It was a decision under the Bihar Tenancy Amending Act. In that case their Lordships of the Judicial Committee applied the Amendment Act of 1934 to a case pending before

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1. (1882) 9 Q.B.D. 672 at 677. 2. (1910) 20 M.L.J. 528.
3. (1918) 36 M.L.J. 257: L.R. 46 I.A. 44: I.L.R. 42 Mad. 400 at 406 (P.C.).
4. (1935) 70 M.L.J. 105: L.R. 63 I.A. 47: I.L.R. 15 Pat. 268 (P.C.).

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the Privy Council. The landlord in that case sued to eject the defendant on the ground that she had taken a non-transferable holding and therefore he had become entitled to re-enter. The Subordinate Judge who tried the case accepted the plaintiff's contention and gave a decree in his favour ejecting the defendant. But the High Court took the view that since the transfer the landlord accepted rent and recognised the rights of the transferee and dismissed the suit. The decision of the High Court was pronounced on the 27th April, 1933, and there was an appeal against the said decision to His Majesty in Council. Pending the appeal to His Majesty in Council the Legislature of Bihar and Orissa passed an Act called the Bihar Tenancy Amendment Act of 1934, which came into force on the 10th June, 1935. By S. 26 (N.) it was provided that:

"Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift or will made before the 1st day of January, 1923."

Therefore the question which their Lordships of the Privy Council had to consider was whether this section would apply, because if it applied the Act must be deemed to have taken away from the appellant the right which he was proposing to enforce in the appeal before the Privy Council. Their Lordships held his right was so taken away and they made the following observations referring to S. 26 (N.) of the Act which are pertinent to the case now on hand:

"Its provision is that every person claiming an interest as a landlord shall be deemed to have given his consent to every transfer made before the 1st January, 1923. This is retrospective: the question is not whether the general language shall be taken only in a prospective sense. The object of this section can only be to quiet titles which are more than ten years old, and to ensure that if during those ten years the transferee has not been ejected he shall have the right to remain on the land. Within this class the legislature has not thought fit to discriminate against tenants whose right is under challenge in a suit, a course which it may well have regarded as invidious or unnecessary. As substantive rights of landlords and their accrued causes of action were to be abrogated, respect for pending suits over old transfers cannot be assumed."

Similarly in the present case the section clearly says that if a person is in possession of land in an inam village on the 30th June, 1934, he shall be deemed to have acquired occupancy right. The object of this section was in unmistakable terms to confer occupancy right on the tenant in possession of such land and respect for pending suits cannot be assumed. In this view the Revenue Court alone would have the jurisdiction and

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the decision of the learned District Judge cannot be sustained and it seems to me unnecessary to consider the argument based on S. 13 of the Amendment Act (XVIII of 1936). The applicability of S. 3 is not controlled or governed by the said section, as in my opinion, apart from S. 13, S. 3 will apply to the cases. All that S. 13 says is that the Act shall apply to all proceedings stayed by S. 127 (2), but it does not affect the application of the Act to other cases nor does it affect the retrospective operation of the Act, if the legislature meant the section to be retrospective.

However, I will deal with the contention based on S. 13. It is contended by Mr. Somayya that the Amending Act (XVIII of 1936) can only apply to pending suits which are stayed under S. 127 (2) of the Madras Estates Land (Amendment) Act of 1934, and S. 127 (2), according to him can only apply to cases where land is comprised in a village which is not an estate within the meaning of S. 3 (2) (*d*) and that as the present agraharam was declared to be an estate within the meaning of the said clause, S. 127 (2) would have no application to the present suits. It must be said that the argument of Mr. Somayya has great force as the language of the section lends support to that contention. But the question is, what was the intention of the legislature in enacting S. 127, cl. (2) of the Madras Act VIII of 1934. As Lord Halsbury observed in *Herron* v. *Rathmines and Rathgar Improvement Commissioners*[1]:

"The subject-matter with which the legislature was dealing, and the facts existing at the time with respect to which the legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the legislature in passing the Act."

The legislature was contemplating an amendment in regard to the conferment of occupancy right on the tenants in inam villages. They were fully aware that the land may form part of a village which is not an estate within the meaning of sub-cl. (*d*), of cl. (2) of S. 3 of the Act or may have formed part of the village within the meaning of the said clause but has ceased to be part of the estate and they wanted to confer occupancy rights in respect of both classes of lands. Legislature was also aware that in respect of both classes of lands there were pending litigations also. The object of the legislature was

1. (1892) A.C. 498 at 502.

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that till they carried out the legislation which they had in contemplation, there should not be any final adjudication of the rights of the parties by Courts of law. This object would be thoroughly frustrated if Mr. Somayya's contention is given effect to and the expression 'not being an estate' were held to qualify 'village' and not 'land' in cl. (2) of S. 127 of the Madras Act (VIII of 1934). No doubt it is not strictly accurate to talk of any land being an estate. But the expression 'any land in an inam village' might comprise the entire land in an inam village or a part thereof. If it comprises the entire land in an inam village it would be synonymous with the village. If it is not, it would be part of the said village. If the entire land is to be taken into consideration, there is no incongruity in qualifying the said land by the expression 'not being an estate'. That a separate part of an inam village can be an estate is also contemplated by the legislature (*vide* S. 5 of the Amending Act). It seems to me the expression 'not being an estate' must be held to govern the land and not only village. If the contention of Mr. Somayya were to be accepted, the Court must in every case come to the conclusion whether it is an estate or not before the amendment can be applied. On the other hand the object of the legislature was whenever any question of kudiwaram right arose with reference to a land in an inam village the actions should be stayed. In S. 127, cl. (2) of the said Act VIII of 1934, the expression used is "all proceedings involving a decision whether or not the inamdar has the kudiwaram right in such land" and the expression is wide and general. The proviso also seems to indicate that the words 'such land' must only mean any land in an inam village and not any land in an inam village qualified by the expression "not being an estate". However, it is unnecessary to rest my decision on this ground since I have already held that the application of S. 3 is not controlled or limited by the application of S. 13 of the Amending Act. Even if my view in regard to the applicability of the Madras Amending Act (XVIII of 1936) is wrong, I am also of the opinion that the case of petitioners on the merits is well founded and I shall proceed to deal with it.

The main question in these suits is whether the plaintiffs have acquired the kudiwaram right within the meaning of the exception to S. 8 of the Madras Estates Land Act. In the plaint which were originally filed, as already stated by me, the

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case was that by virtue of the grant the plaintiffs are the owners of both the warams. There was no allegation that they acquired the kudiwaram subsequent to the date of the grant. In the cases which went up to the Privy Council, two issues were raised, namely:—

(*ii*) Whether or not the plaintiff's predecessors-in-title owned the kudiwaram at the time of the grant?

(*iii*) Whether the plaintiffs or their predecessors-in-title subsequently acquired the kudiwaram right in the suit land? Mr. Narayana Murthi who appeared for the plaintiffs stated that it was not his case that the plaintiff's predecessors-in-title had the kudiwaram interest at the time of the grant or that they subsequently acquired the kudiwaram right and therefore he did not press those issues. In *Seethayya v. Subramania Somayajulu*[1] their Lordships of the Privy Council observed:—

"In the course of these proceedings the respondents have admitted that they did not own the kudiwaram before the grant, and that they did not acquire the kudiwaram independently of and after the grant. . . . . . In view of the admissions made for the purposes of these cases that the respondents did not acquire the kudiwaram subsequently to the grant, it becomes unnecessary to consider the subsequent acts of the parties and the inferences to be drawn from them."

It may be mentioned that the case of the plaintiffs in those cases as laid in the plaint before it came up to the High Court was that the original grant was lost and that the proper inference from all the facts including acts of ownership by themselves and their predecessors was that under the grant they had both varams. Thus various acts including the acts of ownership were relied on for the purpose of establishing that from the inception they had kudiwaram interest in them but not that subsequently the plaintiffs acquired them From the concession made by them it is also clear that those acts were not relied on for the purpose of proving that they acquired the kudivaram subsequent to the date of the grant. If the plaintiffs want to rely on the exception to S. 8 of the Act, it is incumbent on the plaintiffs to prove that in a particular plot of land they acquired the kudiwaram. It will not therefore be permissible for the plaintiffs to rely on any general evidence regarding the acts of ownership in regard to the whole village or in regard to the other plots in the same village. As

1. (1929) 56 M.L.J. 730: L.R. 56 I.A. 146: I.L.R. 52 Mad. 453 (P.C.).

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observed by Venkatasubba Rao, J., in *Ramalinga Mudali* v. *Ramaswamy Aiyar*[1]:

"So far as the exception to S. 8 is concerned, its application depends on particular facts connected with each separate plot in the village. The decision therefore that certain proved facts brought a specific plot within that exception, is a decision which in the very nature of things cannot apply to other and different plots in the same village".

Again as observed by Spencer, J., in *Venkatadasu* v. *Udayanarayan*[2]:

"If the plaintiffs intended to rely on the exception to S. 8 of the Madras Estates Land Act for ousting the jurisdiction of the Revenue Court, it was necessary that they should have advanced a specific case to show by what acts they acquired the kudiwaram interest of their ryots and became entitled to both warams."

In the present suits even after the plea was allowed to be raised, no acts were alleged by which they acquired the kudiwaram right, nor was it alleged when they acquired such kudiwaram right or by whom was such right acquired. As stated by the District Munsiff the argument on behalf of the plaintiffs was that as the plaintiffs were unable at this remote time to prove when or how the kudiwaram was acquired and as the subsequent conduct of the Agraharamdars showed that they were in full possession and enjoyment of both the warams, it must be presumed that their acquisition of the kudiwaram had a legal origin. The District Judge also remarks that:

"There is no direct proof in any of these suits of such acquisition. It is sought to be made out by the plaintiffs from enjoyment of the properties and the conduct of the parties."

It seems to me that this plea ought not to have been permitted at all in the absence of any definite allegations as to the mode of acquisition. The question is whether there is any room in these cases for the application of this theory of lost grant or the presumption of a legal origin and long continued enjoyment of both the warams. At the outset I may state that even this theory of lost grant must be made out with reference to facts of each case. The learned District Munsiff dealt with each case separately and arrived at an independent conclusion in regard to each. But unfortunately though the learned District Judge concurred with the District Munsiff in his treatment of the cases, he never adhered to it but dealt with the cases together and arrived at conclusions based on facts relating to the entire village. The evidence relied on in

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1. (1929) M.W.N. 239 at 249.
2. (1917) 33 M.L.J. 548: 41 I.C. 122 at 125.

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proof of the acquisition of kudiwaram right falls into two classes: (1) general evidence regarding the entire village and the acts of ownership exercised by the Agraharamdars, and (2) evidence regarding each holding. The general evidence relied on comprises three independent pieces of evidence, namely, (1) evidence furnished by what are called Dumbalas which range between 1801 and 1823; (2) evidence furnished by partition proceedings between the Agraharamdars in 1859 and 1860; and (3) certain land acquisition proceedings wherein the Agraharamdars were paid compensation in respect of certain lands in the village. This general evidence as already observed by me is wholly inadmissible and particularly in this case where concession was made that in respect of certain lands in the village, the inamdars have not acquired kudiwaram interest subsequent to the grant. The general evidence is admissible only if it was intended to prove that in the entire village they acquired kudiwaram right subsequent to the grant. In *Ramalinga Mudali* v. *Ramaswamy Aiyar*[1], Venkatasubba Rao, J., considered the evidence in regard to the whole village because the case there made out was that in regard to the entire village kudiwaram was acquired subsequent to the grant. Further the said case can hardly be treated as an authority because it related to a mirasi village where admittedly the mirasdar is the cultivating ryot and the question in that case was whether the zamindar acquired also the rights of the mirasdar. It was not like this case where the cultivating ryots set up occupancy right as against the landlord. However as the learned District Judge was considerably influenced by this general evidence, I shall proceed to deal with the legal inference that can be drawn from that evidence. The dumbalas are Exs. A to A-14. Ex. A relates to Fasli 1192 (that is, 1782-83) and Ex. A-14 relates to Fasli 1231 (1821-22). The learned District Judge says that:

> "They furnish valuable evidence in favour of the Agraharamdars that whatever might have been the state of affairs at the time of the original grant in 1689 there were no tenants with occupancy rights in the lands on the dates of the dumbalas and far from any of the dumbalas lending any support to the contention of the ryots, each one of them has got a deadly effect against their case."

The learned Judge fell into a serious error in regard to the import of these documents. If, according to the learned

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1. (1929) M.W.N. 239.

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Judge, on the dates of these dumbalas there were no tenants with occupancy rights, it could not be said that there was any acquisition by the landlord of such occupancy rights. The learned District Judge entirely forgot that the entire area of this inam village was not cultivated. Even at the time of the inam settlement as will be seen from Ex. D it will be found that the total extent of the inam village was 2409 acres whereof 960 acres were cultivated dry and only 84 acres and odd were cultivated wet and the rest of it was uncultivated and waste. Therefore on the dates of these dumbalas it is not possible to know how much was cultivated. In the lands which were not cultivated it cannot be said that there were any tenants with occupancy rights and in these lands there could be no question of any tenants abandoning occupancy rights or the landlord purchasing occupancy rights and any such acquisition thereof by the landlord. Unless it is possible to establish that the suit lands were lands which were then under cultivation at the time of the dumbalas it cannot be said that there was any acquisition of occupancy right subsequent to the date of the grant.

Coming to the nature of the dumbalas they do not seem to have any such deadly effect as is attributed by the learned Judge. These dumbalas are only permits to enable the Agraharamdars to deal with the produce freed from the burden of paying the dues to the zamindar. The person with whom the zamindar is concerned is only the Agraharamdar because he was the person responsible for the payment of the dues to him. The zamindar is not concerned how the produce is distributed between the Agraharamdar and the tenants who cultivate the land. The nature of, and the value that should be given to, these dumbalas have been very accurately summed up in a considered judgment of Pandalai, J., in S. A. No. 1592 of 1926 and I am constrained to quote the observations of the learned Judge at considerable length bacause that judgment has unfortunately not been reported:

"The dumbalas produced C series and Exs. X and X-a covering the period 1765 to 1836 have been construed by both the lower Courts on the footing that the Privy Council have by a remark in *Venkata Sastrulu* v. *Seetharamudu*[1] given dumbalas generally the meaning and effect of establishing that the inamdar who is mentioned therein is the owner of both warams.

1. (1919) 37 M.L.J. 42: L.R. 46 I.A. 123: I.L.R. 43 Mad. 166 at 172 (P.C.).

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The respondents also rely on it for that purpose. The remark is 'there are also some dumbalas or orders dated in the year 1793 requesting that the plaintiffs' ancestor shall be allowed to reap and enjoy the crops pertaining to Billapadu.' These are dealt with under the category of other confirmatory documents. We are confident that by this remark their Lordships did not intend that wherever dumbalas are found they should have the meaning and effect attributed to them by the plaintiffs irrespective of any consideration of the nature and object of dumbalas and other facts which establish that the inamdars were not and could not be permitted to remove the whole crop or indeed do anything more than take what as between them and the ryots is due to them. Dumbalas are merely part of the machinery of revenue collection when the revenue is calculated on a share of the produce. The revenue being in theory payable in kind by a share of the produce, the zamindar or Government has necessarily to take care that the crop is not before or after harvest removed by any one till the revenue is paid. The local officials having for this purpose detained the crop the dumbala is simply an intimation to them by the zamindar or superior Government revenue official, who has previously received the revenue, that it has been paid or accounted for and that the crop may be permitted to be removed. In short it simply raises the Government embargo on the produce and permits it to be taken away. By whom and of what? It is natural that the revenue authorities should refer to the person who is bound to pay and has paid the revenue. But it is a misunderstanding of the situation and the document to think that the mention of the inamdar means that the whole produce may be appropriated by him and therefore that he is the full owner of the land and that the tenants have no rights. The inamdar is mentioned in the dumbalas because he is the person responsible for the revenue and he in his turn to protect his own interest as well as of the Government to whom he is bound to pay revenue is bound and interested to see that the produce is not taken away by the cultivators till the melwaram out of which both revenue and the inamdar's share has to come is paid."

On a reference to the printed records of the case it will be found that the nature of these dumbalas is more or less similar to that in the present cases. I think the learned District Munsiff has correctly appreciated their true legal effect. The partition proceedings are evidenced by Exs. B, B-1, C and C-1. So far as these documents are concerned, they can never form the basis of any inference in regard to the title to the kudiwaram interest. Whenever there is a partition of an estate among the members of a family, it is usual always to divide the lands which form the estate and not the melwaram. From the description of the land it does not follow that actual lands were divided. In a permanently settled estate, for example, most of the lands would be in the possession of the tenants except lands which were lying waste and were not cultivated. In the case of lands, which are in the possession of tenants, when there is a division of lands, it only means that the person to whom the lands are allotted will realise the

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rents and profits from the tenants who are in occupation of the said lands. It will be seen from Ex. D that nearly 1,400 acres were not in the cultivation of anybody and there is no evidence in the present suit that the lands which are the subject-matter of those suits were not comprised in the lands which were not under cultivation then. It is not possible to draw any inference that there were tenants with occupancy rights in the said lands who had abandoned them or from whom the landlords acquired the kudiwaram right.

Then the next piece of evidence relied on is certain land acquisition proceedings. The circumstances under which compensation was awarded to the Agraharamdars are not in evidence. They have no bearing on the specific issue in the suits, namely, whether a particular plot ceased to be part of the estate. The fact that with reference to certain lands which formed the subject-matter of the said proceedings, compensation was not claimed by the tenant would not be any evidence in regard to other plots of land. Probably they may be evidence in regard to the question whether the zamindar owned both the warams in the entire estate but that question is not in issue. The above three pieces of evidence each by itself being inconclusive even on the question whether the original grant was of both the warams taken together are also inconclusive on the said question and it is not safe to rely upon them to establish the subsequent acquisition of kudivaram interest by the inamdar. Therefore if we eliminate them we fall back upon the evidence with reference to each plot. Before dealing with the said evidence it is necessary to make a few general observations. The lands being *prima facie* in the Arepalli Agraharam, geographically they are within the ambit of an estate within the meaning of the Estates Land Act. Therefore there is a *prima facie* presumption that in the said lands the tenants have got occupancy rights. The Court therefore has to start with the said presumption in deciding whether the inamdar has got the kudivaram right. Under S. 23 of the Estates Land Act and S. 185 of the said Act the presumption is that land in an estate is a ryoti land. The learned District Munsiff has correctly applied the presumption in estimating the evidence. The learned District Judge has in my opinion fallen into an error in thinking that the presumption ought not

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to be applied. The learned Judge remarks at the end of paragraph 7:

"We have nothing to do with the presumptions laid down in the Act when considering the issue whether such an acquisition has been made."

Under the exception to S. 8, sub-S. (2), cl. (*d*) land in an inam village will cease to be part of an estate if it is proved that the tenants' interest in those holdings have been acquired by the inamdar. It is an exception which the landlord will have to make out. The exception is only to the general rule that in every land comprised in an estate the tenant has got occupancy right. It is not possible to understand how the learned District Judge ignored this elementary rule. The evidence abundantly establishes and it is not challenged before me that the lands were never in the personal cultivation of the Agraharamdars. There is no evidence either oral or documentary by which the plaintiffs sought to prove the manner and method of the acquisition of the kudiwaram right and no single instance has been proved of a relinquishment by the tenants or of purchase by the inamdar or of inheritance of any other known mode by which the landlord came to acquire the kudiwaram right. The sole thing relied on is that the Agraharamdars were dealing with the lands as owners and leasing them from time to time for specific periods. The learned District Munsiff disbelieved all the unregistered leases relied on by the plaintiffs. In this the learned District Judge has also concurred. He observes:

"The safe method to adopt with reference to these exhibits is to ignore the unregistered documents altogether."

There remain then the registered leases and other evidence relied on with reference to each of the plots in question. Taking the registered leases they range between 1903 and 1911. The Estates Land Act came into force on the 1st July, 1908. If before the dates of these registered leases the landlord has not acquired kudivaram right, the execution of these registered leases would not affect their occupancy right if they were in possession of the lands on the date of the commencement of the Act. Therefore it has to be proved apart from these leases whether the landlord has acquired kudivaram right. If so, these leases may be some evidence in confirmation of the said right. It is a well-known fact that the zamindars and inamdars anticipating tenancy legislation had been trying by all possible

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means to deny occupancy rights to the tenants and to prevent acquisition of occupancy rights by the tenants and for that purpose have been taking muchilikas with recitals in and by which the tenants stipulate to surrender possession to the landlord at the end of the term. It has always been held that from such a stipulation it is unsafe to presume absence of occupancy right in the tenant. The value of these leases will also be much discountenanced if it is proved that the tenants from whom these leases were taken were in occupation of the said lands on the dates of the said leases. Certain observations in the Privy Council judgments were relied on by Mr. Somayya in this connection. But on a careful perusal of the judgments it will be seen that the observations were made with reference to the particular facts of those cases. For example in *Suryanarayana* v. *Pothanna*[1] it was found that the defendants were let into possession by the inamdars under agreements for terms which expired in each case before the suits for ejectment were brought. Similarly in *Venkata Sastrulu* v. *Seetharamudu*[2] it was found that in 1904 all the tenants formally relinquished their lands to the plaintiff and put him into possession thereof and from that date until the tenancies were granted in the year 1907 the property remained vacant and when the defendants were admitted as tenants, they severally declared that they had no right of occupancy except such as was given to them by the tenancy agreements. Therefore in cases where defendants were let into possession by the inamdar under agreements executed by them, the said muchilikas may be taken into consideration for the purpose of determining whether the landlord or the tenant had the kudiwaram right, but when the defendants were not let into possession under those agreements but they were already in possession on the dates when they executed them, the same inference could not be drawn. Again in one place the learned District Judge remarks:

"We find the Agraharamdars dealing with the lands as if they were their own, dividing them, mortgaging them, selling, exchanging them and letting them for particular periods for specified rents. Effect must be given to this course of known enjoyment of the properties: and under the circumstances it could be given only by presuming that the kudiwaram interest in the holding was acquired by the inamdars at some date or dates subsequent to the grant".

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1. (1918) 36 M.L.J. 585: L.R. 45 I.A. 209: I.L.R. 41 Mad. 1012 (P.C.).
2. (1919) 37 M.L.J. 42: L.R. 46 I.A. 123: I.L.R. 43 Mad. 166 (P.C.).

To my mind this is a sweeping observation made by the learned Judge not borne out by the evidence on record, at any rate so far as the particular plots in these civil revision petitions are concerned. From the analysis given by Mr. Somayya, I find that only in two suits there was either a mortgage or sale. In C. R. P. No. 985, there are two registered mortgages and in C. R. P. No. 984, there are two registered mortgages and one sale. I will deal with the evidentiary value of those documents in dealing with the particular cases. But beyond these so-called mortgages or sales there is no other evidence of mortgages, sales or exchanges. I do not know what the learned Judge means by saying the inamdars divided the lands. That observation can have relevancy only if we were dealing with the question whether in the entire village the inamdars had the kudiwaram or acquired the kudivaram right but it will have no bearing on the question whether in a particular plot of land the inamdar acquired the kudivaram right unless there is evidence that that particular plot of land happened to be the subject of division among the Agraharamdars. There is another observation which the learned Judge makes which requires some notice, namely :—

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"There is not a single instance of any sale of the lands by any one of the so-called tenants and no documentary proof of any partition of the lands in the same family. Oral evidence there is of the tenants themselves to the effect that they divided such and such lands in such and such a manner without any reference to the Agraharamdars or their rights; but such oral evidence has no value in the face of the documents that have been produced by the plaintiffs."

The proof of alienations of lands in the possession of tenants is given for the purpose of probabilising the existence of kudivaram right in the tenant, but the absence of it could not be taken as negativing occupancy right. Where land has been in the possession of a particular family for a considerable period, say 30 or 40 years, and if the said family was not in need to mortgage or sell a land, it is preposterous to expect any sale or mortgage in the said family. I think possession for a considerable length of time should ordinarily be taken as dispensing with such a proof. In most cases it may not be possible to have them though it is desirable or it might be good if such evidence was forthcoming and the absence of such evidence should not be taken as a factor in negativing occupancy right.

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Now I shall proceed to take up each of the cases.

[His Lordship discussed each case separately and held.]

[* * *]

Thus on a consideration of the entire evidence I am of the opinion that the conclusions reached by the learned District Munsif are right. I therefore allow the above revision petitions and reverse the decision of the learned District Judge and restore that of the District Munsif with costs both here and in the Court below.

C. R. P. Nos. 971, 973, 979, 980, 982, 988, 989, 990, 991 and 992 of 1934 are not pressed and are dismissed as withdrawn and there will be no order as to costs.

S. V. V. *Revisions not settled allowed.*
Revisions settled dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE VARADACHARIAR.

Lala Gokuldas and another .. *Appellants* (Plaintiffs)*

v.

John Kantaraj .. *Respondent (Defendant).*

Lala
Gokuldas
v.
John
Kantaraj.

Indian Christian Marriage Act (XV of 1872), Ss. 4, 5, 42, 51 and 77—Solemnisation of marriage—Oath taken before Marriage Registrar—False declarations made as to age of proposed wife and as to residence of parties—Marriage whether rendered invalid.

Where the parties, who were Indian Christians, were in a position to contract a lawful marriage and the marriage was solemnised by the Marriage Registrar in accordance with the provisions of the Indian Christian Marriage Act of 1872 but it appeared that the husband while taking the oath as required by S. 42 of the said Act made two false declarations in the course of his statement, namely, that the proposed wife was of age and that the parties lived within the District,

Held, that the marriage which was duly solemnised and otherwise lawful was not rendered invalid by reason of the false declaration made by the husband while taking the oath.

On appeal from the judgment and decree of the Honourable Mr. Justice Gentle dated the 25th day of August,

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* O. S. A. No. 63 of 1936. 29th July, 1937.

1936 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 151 of 1935.

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T. Krishnaraja Naicker for Appellants.

T. R. Srinivasan for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellants, who are father and daughter, were the plaintiffs in the Court below. They sued for a declaration that the marriage of the second appellant to the respondent solemnized before the Registrar of Marriages at St. Thomas Mount on the 17th July, 1934, is a nullity. The parties are all Indian Christians. At the time of the marriage the second appellant was 18½ years of age, and was a student at the Women's Christian College, Madras. Both she and the respondent who had attained his majority at the time were resident in Madras. The respondent gave notice of the marriage to the Registrar at St. Thomas Mount and falsely declared before him that the second appellant was of age. There being no impediment to the marriage it was duly solemnized on the date mentioned. The learned Judge declared for the validity of the marriage. The appellants challenge this decision on the ground that it conflicts with the express provisions of the Indian Christian Marriage Act of 1872. It is therefore necessary to examine the relevant sections of that statute.

S. 4 provides that every marriage between persons, one or both of whom is or are a Christian or Christians shall be solemnised in accordance with the provisions of S. 5; and any such marriage solemnized otherwise than in accordance with such provisions shall be void. S. 5 states that marriages may be solemnized *inter alia* by a Marriage Registrar appointed under the Act. The marriage in question having been solemnized before a Marriage Registrar, it is necessary to turn to Part V of the Act, which commences with S. 38. This section states that when a marriage is intended to be solemnized by, or in the presence of, a Marriage Registrar, one of the parties to such marriage shall give notice in writing in the prescribed form to a Marriage Registrar of the District within which the parties have dwelt; or, if the parties dwell in different districts, they

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shall give notice to the Registrar of each district, and shall state therein the name and surname, and the profession or condition of each of the parties intending marriage, the dwelling place of each of them, the time during which each has dwelt therein, and the place at which the marriage is to be solemnized. The notice given by the respondent in this case stated that both the parties resided at St. Thomas Mount and was, therefore, deliberately false. On receipt of notice, the Registrar shall, under S. 39, publish it, and under S. 40 enter it in the Marriage Notice Book. S. 41 provides that if the party by whom the notice was given requests the Marriage Registrar to issue the certificate mentioned in the section and if one of the parties intending marriage has made oath as required, the Marriage Registrar shall under his own hand issue a certificate of such notice having been given and of such oath having been made. There are several provisos to this section but it is only necessary to refer to the last of them which says that if one of the parties is a minor the certificate shall not be issued until fourteen days after the entry of the notice have expired. Turning now to S. 42 we find that the certificate shall not be issued by a Marriage Registrar until one of the parties intending marriage appears personally before him, and makes oath—

(*a*) that he or she believes that there is not any impediment of kindred or affinity, or other lawful hindrance, to the said marriage, and

(*b*) that both the parties have, or (where they have dwelt in the districts of different Marriage Registrars) that the party making such oath has, had their, his or her usual place of abode, within the district of such Marriage Registrar,

and, where either or each of the parties is a minor,—

(*c*) that the consent or consents to such marriage required by law has or have been obtained thereto, or that there is no person resident in India authorized to give such consent, as the case may be.

S. 19 of the Act requires in the case of a minor's marriage, the consent of the father, if living, or if the father be dead, the guardian of the person of such minor, and, in case there is no such guardian, then the mother of the minor. This is made applicable to marriages under Part V of the Act by S. 44. The respondent took the oath required by S. 42 and made two false declarations in the course of his statement (*i*) that the second appellant was of age, and (*ii*) that the

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parties lived within the district. By S. 51, after the issue of the certificate of the Marriage Registrar, the marriage may if there be no lawful impediment to the marriage of the parties described in the certificate be solemnized between them, according to such form and ceremony as they think fit to adopt. Now, in this case, as the result of the false declaration which the respondent made, he obtained a certificate which entitled him and the second appellant to be married, there being in it no statement showing any lawful impediment to the marriage. The last section we need refer to is S. 77 which states that whenever any marriage is solemnized in accordance with the provisions of Ss. 4 and 5, it shall not be void merely on account of any irregularity in respect *inter alia* of the following matters:

(*i*) any statement made in regard to the dwelling of the persons married, or to the consent of any person whose consent to such marriage is required by law;

(*ii*) the notice of the marriage.

It is not disputed that the marriage was solemnized by the Registrar on the 17th July, 1934. But it is said that the solemnization was invalid because of the false declaration which the respondent made. This argument, however, ignores the provisions of Ss. 4 and 5 and would read into part V provisions which are not there. The Registrar who solemnized this marriage was authorised by law to solemnize it, and having been solemnized by an official authorised in this respect it cannot be declared to be void under S. 4. As I have pointed out there was no lawful impediment shown in the certificate of notice issued by the Registrar and therefore there was nothing to prevent the Registrar solemnizing the marriage. The respondent of course induced the Marriage Registrar to solemnize this marriage as the result of a false declaration and he has rendered himself liable to severe punishment under S. 66 of the Act, but that is a quite different thing from saying that under the provisions of the Act this marriage is not lawful. There is no provision in the Act which renders this marriage illegal by reason of the false declaration of the respondent. The law is the same in England, and the Indian Christian Marriage Act of 1872 follows English legislation of a similar nature. The parties were in a position to contract a lawful marriage and such a marriage was solemnised by the Registrar in accordance with the provisions of the Act.

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For these reasons we think that the decision of the learned trial Judge was correct and the appeal will accordingly be dismissed with costs.

B. V. V. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD ALNESS, SIR GEORGE LOWNDES AND SIR SHADI LAL.

The Commissioners for the Port of Calcutta.. *Appellants**

v.

The Corporation of Calcutta .. *Respondents.*

P.C. — Commissioners for the Port of Calcutta *v.* Corporation of Calcutta.

Statutory powers—Exercise by railway owners and employees—Pipes of local authority under railway line—Agreement that work to be done to pipes by railway owners at local authority's expense—Local authority's property flooded through alleged negligent acts of railway owners' employee—Work done in exercise of statutory powers—Suit for damages—Calcutta Port Act (Bengal Act III of 1890), S. 142—Special period of limitation.

A statutory body constituted under the Calcutta Port Act of 1890 were the owners and operators of a double-track railway. A local authority had a pumping station near the railway to which water was led from a river by four pipes which passed beneath the railway. The railway owners having decided to lower the railway line at a certain point in order to do away with the inconvenience of a level crossing existing there, were obliged to lower the local authority's four pipes, and duly did so, carrying the pipes below the railway line, as lowered, in three brick tunnels. Subsequently the local authority wished to increase their supply of water from the river, which involved the laying of an additional pipe line. As the new pipe also had to cross the railway line, it was agreed by letters passing between the parties that the railway owners' staff should do the work of laying it at the local authority's expense. As the result of a severe fall of rain flooding took place, and the local authority's pumping station was flooded and damaged. The local authority alleged that the flooding of the pumping station was due to two holes made and kept open by the railway owners' superintendent. The holes in question had been made by the superintendent directly in connection with the project of laying the additional pipe line for the local authority. The railway owners denied negligence and contended that they were in any event protected as the suit was not instituted within three months, which constituted the special period of limitation under S. 142 of the Calcutta Port Act, 1890.

Held, without deciding the plea of negligence, that the local authority having requested the Railway owners, a statutory body, to do certain work, and the Railway owners and their employees having acted in exercise of their statutory powers the action was barred by S. 142 of the Calcutta Port Act.

The words " or purporting or professing to be done " in S. 142 of the Act postulate that work which is not done in pursuance of the statute may

* P. C. Appeal No. 71 of 1936. Bengal Appeal No. 70 of 1934. 26th July, 1937.

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nevertheless be accorded its protection if the work professes or purports to be done in pursuance of the statute.

Held also, that the Calcutta Port Act of 1890 afforded protection not only in respect of a claim based on alleged breach of a statutory duty but also in respect of one based on an alleged omission to perform such a duty.

Decision of the Calcutta High Court reversed.

Appeal from a judgment and decree of the High Court of Judicature, Calcutta (Derbyshire, C. J. and Costello, J.), reversing a decision of the same Court in its original jurisdiction (Buckland, J.).

Forgus Morton, K.C., L. P. E. Pugh and *T. B. W. Ramsay* for Appellants.—A careful examination of the facts shows that the holes made by the appellants' superintendent were made in connection with the work of laying the respondents' fifth pipe, and that they were made in the course of operations on or under the appellants' railway track. Operations of that kind are within the scope of the appellants' duties under the Act by which they were incorporated, and they are accordingly entitled to the protection afforded them by S. 142 of that Act.

A. M. Dunne, K.C. and *J. M. Pringle* for Respondents.—The appellants, in doing the work in connection with which their superintendent made the holes, were acting in a private capacity and not in their statutory capacity, and they are accordingly not entitled to the protection of S. 142. In doing the work they were acting in the capacity of private contractors working for the respondents. They had divested themselves of their statutory capacity in undertaking to do the work. Counsel referred to *Bradford Corporation* v. *Myers*[1]. The appellants' act of making the holes, and/or their omission to close them up afterwards, was not something done or purporting or professing to be done in pursuance of the Calcutta Port Act. In any case, the Act must be strictly construed: while it affords protection against a claim based on a breach of a statutory duty, it does not afford protection against a claim arising out of an omission to perform a statutory duty.

26th July, 1937. Their Lordships' judgment was delivered by

Lord Alness.

LORD ALNESS.—This is an appeal from a judgment and decree of the High Court of Judicature in Calcutta, dated 22nd August, 1935, which reversed the judgment and decree of the same Court in its original civil jurisdiction, dated 8th June, 1934, and which decreed the respondents' suit to recover

1. (1916) 1 A.C. 242.

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from the appellants the sum of Rs. 44,612-9-4 as damages for negligence.

The questions at issue are whether the appellants are liable for the damage caused by the flooding of the respondents' pumping station, and whether their claim was barred by time in virtue of a provision in the Calcutta Port Act, 1890.

The principal facts in the case are not in dispute, nor is the amount of damages due by the appellants, if liability is established.

As their Lordships have formed a clear opinion that the respondents' claim is statute barred, and, as their Lordships, in that view, deem it unnecessary to form or express an opinion on the question of negligence, it is possible to abridge the examination of the facts which would otherwise have been appropriate and necessary.

The appellants are a statutory body, constituted under the Calcutta Port Act (Bengal Act III of 1890). The respondents are a statutory body, constituted under the Calcutta Municipal Act (Bengal Act III of 1923).

The appellants own and operate a double track railway which runs north and south, on the east aside of the river Hugli, and which is parallel and adjacent to the river. The railway crosses at right angles the approach road to the Howrah Bridge, which links up the towns of Howrah and Calcutta, lying respectively on the west and east side of the river. The respondents have a pump house in the angle formed by the interception of the railway with the approach road. Unfiltered water for the use of the inhabitants of Calcutta is drawn from the river through four suction pipes, which run from the river under the appellants' railway to the pump house.

In or about the year 1914, in order to avoid the inconvenience of the then existing arrangement, whereby the railway traversed the approach road by a level crossing, the appellants executed a scheme, in virtue of which the railway was carried under the approach road. This scheme involved the lowering of the respondents' suction pipes, so as to keep them under the level of the railway. The appellants carried the respondents' pipes from the river side to the pump house in three brick-lined tunnels, which were sealed up on the river side. The middle tunnel carried two pipes, and the tunnels

on the north and south of it carried one pipe each. The appellants then laid the railway over the top of the roof of the tunnels. In order to afford protection to the tunnels, they overlaid the roof with steel plates.

To protect the railway against flooding the appellants constructed a drain in the middle of the railway track. The drain ran into a sump, which was emptied by two pumps set up in a pump house belonging to the appellants, and situated on the other side of the railway line from and just opposite to the respondents' pump house. The respondents also had a sump in their pump house, with a small pump attached to it.

In the beginning of the year 1926, the respondents, being desirous of increasing their supply of unfiltered water from the river, discussed with the appellants a project for laying down a fifth pipe through which to draw water from the Hugli to the respondents' pump house along a line south of the southernmost of the existing pipelines. As this pipe, like the others, had to be carried across the appellants' railway, it was agreed, by letters passing between the parties, and hereinafter referred to, in order to ensure as little interference with the railway as possible, that the work should be done by the appellants' staff at the respondents' expense.

On 21st and 22nd July, 1926, while the laying of the fifth pipe line was under discussion, an abnormal fall of rain occurred in Calcutta, and flooding ensued. In particular, the appellants' subway was flooded. The water flowed into their pump house, and overwhelmed the pumps. It poured through the tunnels, and over certain screen walls into the respondents' pump house. The whole pumping plant was thereby put out of action.

The respondents, in their plaint, alleged that their pump house was flooded in consequence of the appellants' negligence. They stated that the rush of water into the pump house was due to the existence of two holes under the steel plates, which were made by the appellants, or which they suffered to remain open. In both respects the appellants were alleged to have been guilty of negligence.

The appellants, in their written statement, denied the charge of negligence, and they also denied responsibility for making the holes or leaving them open. They also

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charged the respondents with negligence. They further pleaded S. 142 of the Calcutta Port Act as barring the respondents' claim.

Several issues were framed for the trial of the suit. The eleventh issue was in these terms—"Is the suit time barred by reason of S. 142 of the Port Act?" The section is in these terms:—

"No suit shall be brought against any person for anything done or purporting or professing to be done in pursuance of this Act, after the expiration of three months from the day on which the cause of action in such suit shall have arisen."

This issue was determined by Mr. Justice Buckland on the pleadings in the appellants' favour. This judgment was recalled on appeal, the Court of Appeal holding that the issue could not properly be determined until the facts had been investigated. The suit was accordingly remitted for trial.

In the course of the trial, it emerged in examination of the appellants' witnesses, that the holes referred to had been made in June, 1926, by or under the supervision of one Manotosh Chatterjee, a superintendent of works in the appellants' service, in connection with the project of laying the fifth pipe line already referred to, and in order to locate in the ground, as he alleged, the exact centre of the southern pipe in connection with the project of laying the fifth pipe line.

Mr. Justice Buckland, after evidence and argument, delivered judgment on 8th June, 1934, dismissing the respondents' suit. He held (1) that no negligence on the appellants' part had been found, and (2) that, in any event, Chatterjee, in making the holes, was acting on behalf of the appellants in pursuance of the Calcutta Port Act, and (3) that the respondents' claim was accordingly barred by S. 142 of that Act. The learned judge accordingly dismissed the suit.

From this judgment the respondents appealed. The Appeal Court, on 22nd August, 1935, allowed the appeal, and passed a decree for the amount claimed. The learned judges of the Appeal Court held (1) that the cause of the damage to the respondents' pumping station was the appellants' negligence in leaving the holes open, and (2) that the appellants were not protected by S. 142 of the Port Act, as the acts of Chatterjee

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in making and leaving the holes open were not done by the appellants in pursuance of the Port Act.

From that judgment the present appeal has been taken. As already indicated, their Lordships regard themselves as absolved from considering and determining the issue of negligence, inasmuch as they are satisfied that the appellants can successfully invoke the protection of S. 142 of the Port of Calcutta Act.

In order to appreciate precisely the work which was being effected when the cause of action arose, it will be convenient *in limine* to bear in mind the terms of two letters which passed between the appellants and respondents. On 2nd February, 1926, the respondents' constructional engineer wrote to the secretary of the appellants in these terms:—

"I have the honour to inform you that this Corporation proposes to erect an additional 42" diar, suction pipe and to extend the existing jetty by about twelve feet in which to carry this pipe at the above Pumping Station.

"I herewith enclose the plans relative to this proposal for your Commissioners' information and beg to point out that this scheme will affect the river front of the heavy lift yard by shortening same at the North end by twelve feet.

"As regards the crossing of your Commissioners' subway and railway lines it is suggested that this work be executed by your Commissioners so that as little interference as possible will occur in the working of your railway and this matter has been discussed with your Commissioners' Engineers who are preparing an estimate which will be laid before my Committee for their approval with regard to this portion of the work.

"I shall be glad if you will look into this matter and let me have the approval of your Commissioners at an early date to the execution of this work."

The reply to that letter was in these terms:—

"I beg to refer to your letter W.W. 6616 dated 2nd February, 1926, regarding a proposal to install an additional suction pipe at Mullick Ghat Pumping Station, which has since been discussed by you with the Commissioners' Engineering Department.

"It is agreed that the construction of the culvert from and including the river side retaining wall to the back of the retaining wall at the Pump House should be carried out by the Commissioners' Staff, and I enclose an estimate of Rs. 44,620 for this work. This estimate cannot, however, be regarded as an accurate one, as it is difficult to estimate correctly the cost of some portions of the work, and it is quite possible that it may be considerably exceeded. The Corporation would of course be liable for any expenditure incurred over and above the estimated amount which would be refunded. A nominal way-leave rental of Re. 1 per annum would be charged for the pipes crossing the Commissioners' land.

"As regards the extension of the Mullick Ghat Jetty, the sanction of the Local Government will be necessary under S. 83 of the Calcutta Port Act,

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and Government insist, in all such cases, on an undertaking being given that any work below the high water mark at the time of construction will be removed without any claim to compensation if such removal be considered necessary by the Port Commissioners at any time in the interests of the Port. The Chairman on receipt of a letter from the Chief Executive Officer, giving this undertaking, will propose to the Commissioners that they should recommend Government to accord sanction to the extension. Three copies of the plan should be attached to the letter."

Following on these letters, certain exploratory work proceeded, in which Chatterjee was employed. Both Courts accepted as accurate and reliable Chatterjee's statement of what he did in making the holes, and why he made them. Both Courts also accepted the view that Chatterjee was instructed to get measurements, and that he adopted his own method of procuring these. Was Chatterjee purporting or professing in what he did to act in pursuance of the Calcutta Port Act? That is the question. The trial judge answered that question in the affirmative, and their Lordships think that he was right in so doing.

The letters quoted disclose that an appeal had been made to the appellants as a statutory body to do certain work. To that appeal they assented. The work related to the appellants' railway track. It was being done on their property, and in their interest. The workmen, including Chatterjee, were paid by the appellants, presumably from statutory funds, and the work was superintended by them. In what Chatterjee did or omitted to do, he was solely concerned with his employers' business. The respondents' argument was that the appellants failed to repair a part of their railway line, which was situated on their own land. In these circumstances, it is vain, in their Lordships' opinion, to suggest, as the respondents did, that the appellants were acting in a private capacity, or indeed, in any other than their statutory capacity.

The suggestion made on behalf of the respondents in argument was that the appellants were acting in the capacity of private contractors. Their Lordships are unable to accept this view. In point of fact, there was then no contract between the parties: the work being done was, as already stated, of an exploratory character. A contract may have been in contemplation of the parties: but it was not in being. Their Lordships are clearly of opinion that the appellants did not divest themselves of their capacity as a Port authority, and did not assume some other capacity, in having the work done.

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Reliance was placed by the respondents on the case of the *Bradford Corporation* v. *Myers*[1]. Now, inasmuch as that case related to the construction of the Public Authorities Protection Act (1893), which contains language not to be found in the Indian statute, and which omits language to be found in the latter, manifestly the decision falls to be handled with care. In particular, the English Act does not contain the words "purporting or professing to act in pursuance of the statute". Their Lordships regard these words as of pivotal importance. Their presence in the statute appears to postulate that work which is not done in pursuance of the statute may nevertheless be accorded its protection, if the work professes or purports to be done in pursuance of the statute. The English Act was properly treated by the House in the *Bradford* case as one from which the words "professing or purporting" were omitted, and the observations of the House must, of course, be construed "*secundum subjectam materiam*". They have, in their Lordships' judgment, no application to this case. Their Lordships can find nothing in the *Bradford* case which forbids the interpretation which they propose to attach to the Indian Act. Their Lordships were not referred to any decision on that Act, either by this Board or by any Court in India. It apparently therefore falls to be construed judicially for the first time.

The respondents argued that the Indian statute fell to be strictly construed, and that, while it protects against a claim based on breach of statutory duty, it does not protect against an omission to perform a statutory duty. Their Lordships are unable to accept either argument. The argument is unsupported by authority, or from any other source.

The Court of Appeal in their judgment would appear, their Lordships think, to have forgotten (1) that the appellants were engaged in work designed for the protection of their railway, and (2) that the neglect complained of was leaving unrepaired a portion of that railway. These circumstances, in their Lordships' view, render it impossible to divorce the work which was being done from the statutory capacity in which the appellants were doing it.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, the decree of the

1. (1916) 1 A.C. 242.

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appellate side of the High Court set aside with costs, and the decree of Buckland, J., dismissing the suit restored. The respondents must pay the costs of the appeal.

Solicitors for Appellants: *Sanderson, Lee & Co.*

Solicitors for Respondents: *T. L. Wilson & Co.*

R. C. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Abdul Hafiz Saheb .. *Petitioner* (4th Respondent)*

v.

Abdul Sukkur Saheb and another .. *Respondents (Petitioner and 5th Respondent).*

Abdul Hafiz Saheb *v.* Abdul Sukkur Saheb.

Civil Procedure Code (V of 1908), Ss. 39, 42 and O. 21, r. 10—Limitation Act (IX of 1908), Art. 182, cl. (5)—Decree passed by Court A against X and Y—Decree transferred to Court B as immovables of X were situate there—Application to Court B to execute by arrest of Y—Certificate under S. 41, Civil Procedure Code, not sent to transferor Court by date of application—Application for arrest to B if made to a proper Court.

A decree for money was passed by the Small Cause Court at *T* against two defendants. As one of the defendants (first) had immovable property within the jurisdiction of the Munsiff, the decree was transferred for execution to that Court. After the transfer but before the report under S. 41, Civil Procedure Code, was sent to the transferor Court *T* by the transferee Court (Munsiff's), an application was made to the Munsiff for an order to arrest the second defendant in the suit. It was contended that inasmuch as the transfer was only for execution against the immovable properties of the first defendant, the transferee Court could not entertain a petition for execution by arrest of the second defendant and that therefore the application was not made to the *proper Court* so as to serve as a step-in-aid to a later application.

Held, that the application was an application in accordance with law and made to the "proper Court" within the meaning of Art. 182 (5) of the Limitation Act. Taking the provisions of S. 32, O. 21, r. 10 and S. 42, Civil Procedure Code, together, the natural effect is that unless in the order of transfer of decree, there is any express limitation of the purpose for which the transfer is made—assuming that such limitation, if any, can control the provisions of the Code as to jurisdiction—there is no reason to limit the powers of the Court to which a decree is transferred for execution. In a case falling under cl. (2) of S. 39, no such limitation can exist at all and it is not right even in a case falling under sub-cl. (*a*), (*b*) or (*c*), to limit the powers of the Court to which the decree is sent.

Chhatra Pat Singh v. *Kharaj Ram*, (1936) I.L.R. 63 Cal. 1210, not approved.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of Small Causes at

* C. R. P. No. 369 of 1936. 20th August, 1937.

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Trichinopoly dated 2nd December, 1935 in E. A. No. 1577 of 1935 in S. C. S. No. 3653 of 1923.

T. A. Ananta Aiyar for Petitioner.

V. S. Rangachari for Respondents.

The Court delivered the following

JUDGMENT.—The only question arising for determination in this Revision Petition is whether the execution petition which has been ordered by the lower Court was in time. This in turn will depend upon whether an earlier execution petition dated 7th August, 1933, which was presented to the District Munsiff's Court, Trichinopoly, was an application in accordance with law and presented to the " proper Court ".

The decree under execution is one passed by the Court of Small Causes at Trichinopoly. As one of the defendants had immovable property within the Munsiff's jurisdiction, the decree seems to have been transferred to the District Munsiff's Court and as a result of proceedings taken there, some of the immovable properties were sold and part of the decree amount realised during the year 1930. On 7th August, 1933, an application was made to the District Munsiff's Court for an order to arrest the second defendant in the suit. It is now common ground that by that date no report had been sent by the District Munsiff's Court to the Court of Small Causes so as to deprive the Munsiff's Court of the power to execute the decree any further. The Munsiff's Court however returned the application on 7th August, 1933, with the following endorsement:

> " Legal representatives cannot be added in this Court. This application may be made to the Small Cause Court".

This endorsement refers to the fact that by that time the first defendant was dead and if the decree-holder wanted to bring his legal representative on record an application for that purpose must be presented only to the Court which passed the decree. In answer to this endorsement it was rightly pointed out on behalf of the decree-holder that execution was at that time sought only against the second defendant and that when he thought fit to take execution proceedings against the legal representatives of the first defendant he would apply to the Court which passed the decree. For some reason not appearing on the record the District Munsiff's Court nevertheless returned the application stating that the petitioner will apply for

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retransfer of the decree to the Small Cause Court and ask for arrest therein. After re-transfer and re-presentation, that petition was dismissed for non-payment of batta by the Court of Small Causes.

It has been argued before me that this petition to the Munsiff's Court dated 7th August, 1933, is not one presented to the "proper Court" because the transfer to the Munsiff's Court must be taken to have been made only for the purpose of proceeding against the immovable properties situate within that Court's jurisdiction and that as the Small Cause Court was competent to issue a warrant for the arrest of the second defendant, the application for that purpose should have been made to the Small Cause Court and not to the District Munsiff's Court. I am not able to accede to this contention. S. 30 of the Code of Civil Procedure provides that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution; and in O. 21, r. 10 there is a provision that the holder of a decree who desires to execute it shall apply to the Court which passed the decree or if the decree has been sent to another Court, then to such Court. S. 42 enacts that the Court executing a decree shall have the same powers in executing such decree as if it had been passed by itself. Taking these three provisions together, it seems to me that their natural effect is that unless in the order of transfer there is any *express* limitation of the purpose for which the transfer is made—assuming that such limitation, if any, can control the provisions of the Code as to jurisdiction,—there is no reason to limit the powers of the Court to which a decree has been transferred for execution. Indeed it is possible to construe the observations of the Judicial Committee in *Maharaja of Bobbili* v. *Narasaraju Bahadur*[1] as depriving the original Court of jurisdiction to execute its decree once the decree has been sent to another Court for execution till the certificate under S. 41 is received from the transferee Court. A Division Bench in this Court has distinguished that case in the decision reported in *Subba Rao* v. *Ankamma*[2]. The latter case is clearly distinguishable because the application there was made by the assignee decree-holder for the purpose of having himself recognised as the assignee and it is well settled that an applica-

1. (1916) 31 M.L.J. 300: L.R. 43 I.A. 238: I.L.R. 39 Mad. 640 (P.C.).
2. (1932) 63 M.L.J. 788.

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tion for that purpose can be made only to the original Court. On the other hand, a Division Bench of the Bombay High Court went so far as to hold that even an application for transfer of the decree to another Court ought not to be made to the original Court before the certificate under S. 41 has been received from the Court to which the decree was first sent for execution. The question I am now concerned with is, however, not whether the original Court retains jurisdiction or not, but what is the extent of the jurisdiction of the Court to which the decree has been transferred for execution.

Mr. Anantha Aiyar seeks to impose restrictions upon its powers by reason of the considerations mentioned in cls. (*a*), (*b*) and (*c*) of S. 39 as justifying the transfer. He concedes that the present case will not properly fall under cl. (*a*), (*b*) or (*c*). Obviously in a case falling under cl. (*d*) or in a case falling under cl. (2) of that section, no such limitation can exist at all. I may add that I do not think it right even in a case falling under sub-cl. (*a*), (*b*) or (*c*) to *limit* the powers of the Court to which the decree is sent. Those clauses only deal with the circumstances justifying a transfer and they need not necessarily define the powers of the Court to which the decree is sent for execution, because that is provided for in other sections of the Code. I admit that there are observations in *Chhatra Pat Singh* v. *Kharaj Ram*[1] which lend some support to Mr. Anantha Aiyar's contention; but, with all respect, I hesitate to follow them. In the present case we do not even have on record the petition on which the original order was made transferring the decree to the District Munsiff's Court nor have we even a copy of the order of transfer. It must merely be a matter of speculation as to what the reasons for the transfer might have been. It is also unnecessary in this case to decide on the conflict between *Saradakripa Lala* v. *The Comilla Union Bank, Ltd.*[2] and *Chettiar Firm* v. *Vanappa Chettiar*[3] because the application of 7th August, 1933, was undoubtedly one for execution of the transferred decree and not for stay of its execution.

The Revision Petition fails and is dismissed with costs.

S. V. V. —— *Petition dismissed.*

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1. (1936) I.L.R. 63 Cal. 1210.
2. (1933) I.L.R. 60 Cal. 1119.
3. A.I.R. 1936 Rang. 184.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE KING.

Chittaluri Sitamma *alias* Sitabayamma and another .. *Appellants** (*Defendants 1 and 4*)

v.

Saphar Sitapatirao and others .. *Respondents* (*Plaintiff-Defendants 5, 7, 10 and 11*).

Sitamma *v.* Sitapatirao.

Hindu Law—Limitation Act (1908), Arts. 142 and 144—Purchase in the name of wife by a Hindu—Plea of benami purchase—Onus—Moneys contributed by the husband—If conclusive in favour of benami—No intelligible motive—Motive suggested itself suggesting a real transfer—Reasonable inference that it is not benami—Suit for possession—Scramble between parties to get posses sion—Possession with tenants—Article of Limitation Act applicable—Art. 144 and not Art. 142.

Where it is pleaded that the properties purchased and standing in the name of a Hindu woman were purchased with the funds belonging to her husband benami in her name, and it is not suggested that the husband had any creditors from whom he desired to screen these properties, and it is in evidence that the lady herself had some means of her own, though the amount thereof is not known.

Held, the onus lies in the first instance on the person who pleads that these transactions are benami. The mere suspicion that the purchases might not have been wholly made with the lady's money will not suffice to establish that the purchases were benami, nor even the suspicion that monies of the husband must have also contributed to these purchases. Even in cases where there is positive evidence that money had been contributed by the husband and not by the wife, that circumstance is not conclusive in favour of the benami theory, though it is an important criterion. Where the motive alleged for a benami transaction itself suggests that the purpose in view could be served only by a genuine transfer and not by a benami transaction, the more reasonable inference is that the transfer was intended to be operative as a transfer of the beneficial interest and not as a mere benami transaction.

Where the properties standing in the woman's name were all in the possession of tenants and as long as the son was alive, he was taking muchilikas in his name and collecting the income, but then the mother and son were living amicably together and after the son's death a scramble for possession began by the attempts made by the daughter-in-law and mother-in-law or the donee from her each trying to get the tenants to attorn to their side.

Held, that in such circumstances the principle of Art. 144 and not Art. 142 of the Limitation Act should be applied.

Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in O. S. No. 34 of 1927.

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* Appeal No. 112 of 1931 and S. A. No. 1214 of 1932. 19th March, 1937.

Sitamma *v.* Sitapatirao.

B. Satyanarayana and *V. Govindarajachari* for Appellants.

K. Umamaheswaran and *A. Rama Rao Saheb* for Respondents.

The Court delivered the following :

JUDGMENT.—This appeal arises out of a suit for recovery of possession of 15 items of properties on the ground that the plaintiff has become entitled thereto under a gift deed (Ex. A) executed in his favour by one Seetha Bai Ammal on the 4th September, 1914. Seetha Bai Ammal was the widow of one Jagannadha Rao and the mother-in-law of the first defendant. As the first defendant is also called Seetha Bai Ammal, we will refer to the first defendant when necessary as the daughter-in-law.

Jagannadha Rao died some time in 1903, leaving him surviving his widow Seetha Bai Ammal and an adopted son Subba Rao, who died in May, 1914. The evidence shows that during the last days of Subba Rao or soon after his death the relations between the mother-in-law and the daughter-in-law became strained and the plaintiff who is the grandson of a brother of the mother-in-law and who had been living in Subba Rao's family for some years managed to persuade the old lady to execute a gift in his favour of properties in respect of which the title stood in her name. The old lady died a few months after the date of the gift: and, for several years thereafter, the plaintiff on the one hand and the first defendant on the other have been endeavouring to secure the tenants in possession of these properties to their respective sides till ultimately the plaintiff instituted this suit just when the period of 12 years from the date of the gift deed was about to expire.

The plaintiff claimed that the properties in respect of which the title deeds stood in the donor's name were her stridhanam properties and that she was accordingly competent to make a gift thereof. The first defendant who was the contesting defendant pleaded that though the title to these properties stood in Seetha Bai Ammal's name, they had all been purchased with the funds belonging to Jagannadha Rao, *benami* in her name. A plea of limitation was also raised. The question of benami formed the subject of the first issue and the question of limitation of the second issue.

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The learned Subordinate Judge found the first issue in plaintiff's favour; on the second issue he found that as regards five items, namely, items 1 to 3, 13 and 15, the plaintiff had not shown that he or his donor had been in possession within 12 years of the institution of the suit but that in respect of the other items the plaintiff's possession within the statutory period had been proved. He accordingly dismissed the suit so far as it related to items 1 to 3, 13 and 15 and gave a decree in the plaintiff's favour in respect of the other items. The first defendant has filed this appeal against so much of the decree as is against her and the plaintiff has filed a Memorandum of Objections in respect of the items disallowed to him.

In dealing with the question of benami, we may mention at the outset that it has not been suggested that Jagannadha Rao had any creditors from whom he desired to screen these properties. It is obvious from the written statement that the first defendant was hard put to it to suggest a motive for a benami transaction. It is true that Jagannadha Rao took the first defendant's husband in adoption in 1884, and some of the letters exhibited in the case show that as a young boy he was not easily persuaded to come and live with his adoptive parents and preferred to go back to the place where he had theretofore been living. These letters relate to a period when the first defendant's husband was 8 or 9 years old and it would be too much to suggest that at that time such conduct brought about any *differences* between Jagannadha Rao and the adopted son with reference to which the necessity for resorting to benami transactions could be explained. In paragraph 3 of the written statement it is stated that Jagannadha Rao took such precautions as he liked in order to avoid among other things the possibility of the adopted son quarrelling with him and squandering the properties and in order to ensure the obedient conduct of the adopted son to his dictates and to avoid the possibility of the members of his natural family instigating the adopted son to act adversely to the interests of the adoptive father. In the course of the evidence one or two further reasons have been suggested, such as, a desire on Jagannadha Rao's part to keep apart some properties for the benefit of any *aurasa* son that he still expected might be born to him or a desire to ensure that the adopted son would behave respectfully towards Sita Bai Amma by making it appear that

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she was the owner of some properties. We find it hard to believe that any of these motives would have led to a benami transaction rather than to a real transaction in favour of the wife.

The principal argument of Mr. Govindarajachari before us on behalf of the appellant was that as the attempt on the plaintiff's side to establish that these properties were acquired with the lady's funds had failed, it must be held that they were purchased by Jagannadha Rao with funds belonging to the joint family of himself and his adopted son, and that as sufficient provision for her maintenance had been made by Ex. B and also by the provision in the adoption deed itself in the possible contingency of differences between her and the adopted son, there was nothing to rebut the presumption arising under the law that the purchases made in the wife's name with family funds were only made for the benefit of the family. It seems to us that this argument puts the effect of the evidence much too high and that the legal implications therein contained are not altogether tenable. It appears from the documentary evidence as well as from the admissions made by the first defendant herself and by D.W. 13, that Seetha Bai Amma did have some monies of her own and some money-lending transactions of her own. It is, however, not possible to fix the amount that she was thus in possession of. The evidence also establishes that at least after 1886, she must have been entitled to an annual income of between Rs. 100 and Rs. 200 from the properties set apart for her under Ex. B, while the collection of that income was being made by Jagannadha Rao himself. In such circumstances, the mere fact that the plaintiff or his witnesses do not now find it possible to connect any of the sale-deeds relating to the suit properties with a particular item of asset belonging to the lady does not necessarily lead to the inference that the purchases should have been made with family funds by Jagannadha Rao. Some of the transactions under which the suit properties were acquired were for comparatively small prices. The only substantial acquisition was under Ex. D in 1896, the consideration therefor being made up of the amount which accrued due on a usufructuary mortgage of 1887 for a sum of Rs. 2,250 and a cash payment of Rs. 700. In the light of the circumstances stated above, there is nothing that necessarily suggests that the Rs. 700 paid in cash at the time

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of Ex. D must have been Jagannadha Rao's money and could not have been the lady's. As regards the Rs. 2,250 advanced on the usufructuary mortgage in 1887, we have no evidence suggesting whether it could have been the lady's money or Jagannadha Rao's money. The position therefore at best only comes to this: here is a lady, the wife of a comparatively well-to-do man with an income of more than Rs. 1,500 per annum, the lady herself having some means of her own, though the amount thereof is not known. The husband had no intelligible motive for entering into any benami transaction. He gets documents executed in the name with a distinct statement that the monies paid for the purchase constituted the stridhanam property of the lady. In relation to the properties thus acquired, he takes registered lease deeds in the lady's name and also gets a power-of-attorney executed by that lady appointing her own agent to attend to her affairs. It does not appear that during all the time that Jagannadha Rao was alive, he ever took a single lease deed in his name in respect of these properties; except as regards one house which was leased to the Postal Department. There is no doubt evidence that the realisation of the income from these properties was attended to by Jagannadha Rao or his men, but that would have been equally the case even if these properties belonged to the lady and not to Jagannadha Rao. It is admitted that in respect of a mortgage under which money was due to this lady long prior to the adoption and in respect of the properties settled on this lady by Ex. B, the interest or income used to be realised by Jagannadha Rao or his men.

It is clear from the adoption deed and from Ex. B that Jagannadha Rao was alive to the possibility of the relations between his wife and the adopted son turning out to be unfriendly and it is nothing strange if in those circumstances a man in that position desired to put the lady in a position of some independence without depending upon the adopted son or being obliged to sue him for maintenance or for a share in terms of Ex. I. It is also significant that even during the period when he was taking sale-deeds in his wife's name in respect of the suit properties, he was entering into other transactions of sale and mortgage in his own name, thus showing that he had no reason at that time to make it appear that he had no properties of his own other than the ancestral pro-

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perties. Having regard to these circumstances we think the learned Subordinate Judge was justified in coming to the conclusion that the sale-deeds relating to the suit properties were not taken in Seetha Bai Ammal's name benami for her husband or for the family. The onus lies in the first instance on the defendant who pleads that these transactions are benami. The mere suspicion that the purchases might not have wholly been made with the lady's money will certainly not suffice to establish that the purchases were benami, nor even the suspicion that monies belonging to Jagannadha Rao, whether in a similar measure or a larger measure, must have also contributed to these purchases. Even in cases where there is positive evidence that money had been contributed by the husband and not by the wife, that circumstance is not conclusive in favour of the benami character of the transaction, though it is an important criterion. It is true that in the Indian Law the English rule as to presumption of advancement has not been adopted, but S. 82 of the Indian Trusts Act as well as the observations of the Judicial Committee in *Bilas Kunwar* v. *Desraj Ranjit Singh*[1] recognise that money may have been contributed by another towards a purchase with the intention of giving a beneficial interest to the person in whose name the purchase is made. The relationship of husband and wife between the person who contributes the money and the person in whose name the sale is taken will be a very important factor in determining whether the transaction was really meant for the benefit of the wife or not. The observations in *Sanjivaroya Pillai* v. *Balambiki Ammal*[2] are not opposed to this view because there was evidence in that case to suggest that the transfers were taken in the wife's name with a view to screen the property from creditors. In *Rahiman Beebi* v. *Khathoon Bee*[3] and *Thulasi Ammal* v. *The Official Receiver, Coimbatore*[4], reference has been made to the terms of S. 82 of the Trusts Act and an attempt has been made to read the observations of the Judicial Committee in earlier cases consistently with the provisions of that section. The observations of their Lordships in *Ismail Mussajee Mookerdum* v. *Hafiz*

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1. (1915) 29 M.L.J. 335: L.R. 42 I.A. 202: I.L.R. 37 All. 557 at 564 and 565 (P.C.).
2. (1907) 17 M.L.J. 339.
3. (1916) 4 L.W. 193.
4. (1934) 67 M.L.J. 541.

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Boo[1] and of Venkatasubba Rao, J., in *Thulasi Ammal* v. *The Official Receiver, Coimbatore*[2], also show that where the motive alleged for a benami transaction itself suggests that the purpose in view could be served only by a genuine transfer and not by a mere benami transaction, the more reasonable inference is that the transfer was intended to be operative as a transfer of the beneficial interest and not as a mere benami transaction.

Mr. Govindarajachari next suggested that if and in so far as any monies of Jagannadha Rao had gone to make the purchases of the suit property in his wife's name, a gift thereof would be invalid as a gift of joint family property. This question was not raised in the Court below in that form and the appellant's learned Counsel explains it by pointing out that the plaintiff's attempt in the lower Court was to establish that the purchases were made with the lady's funds and not with the family funds. Assuming that that contention can be raised at this stage, it will be material to consider it only if there is *positive* evidence that funds belonging to the joint family had been used for the purpose of these purchases. The mere fact that the plaintiff is not able to establish that the purchases were made with the lady's funds, will not entitle the first defendant to ask the Court to take it for granted that joint family monies must have been utilised for these purchases. We accordingly confirm the finding of the lower Court on the first issue.

With reference to the plea of limitation, we are not satisfied that the lower Court was justified in dealing with the case as one governed by Art. 142 of the Limitation Act. The allegations in the plaint as well as the evidence tendered during the course of the trial establish that all the suit properties were in the possession of tenants. It is true that during Subba Rao's time he was taking muchilikas in his name and collecting the income from the suit properties. But as he and his adoptive mother were living together amicably, it cannot be seriously suggested that his possession or management was adverse to the mother's interest. As we have already said, the relations between the mother-in-law and the daughter-in-law became strained as soon as Subba Rao died and the plaintiff's interference with a view to securing some benefit to himself

1. (1906) 16 M.L.J. 166: L.R. 33 I.A. 86: I.L.R 33 Cal. 773 at 784 (P.C.).
2. (1934) 67 M.L.J. 541.

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seems to have made matters worse. A scramble accordingly began after Subba Rao's death by the attempts made on each side to get the tenants to attorn to the one side or to the other. In circumstances of that kind, the principle of Art. 144 and not Art. 142 should be applied. Considering the evidence on this basis, the conclusion seems to us to be that in respect of most of the suit items, the first defendant has failed to show that she got the tenants in possession to attorn to her more than 12 years before the institution of the suit. In many instances registered muchilikas have been taken from the tenants in the mother-in-law's name and there is evidence that some of these tenants were sued for rent on the basis of such muchilikas and decrees were obtained. As against such evidence on the plaintiff's side, the story related on the defendant's side of oral arrangements and payments of rent to her can scarcely be seriously pressed.

As regards one of the items of property, namely, item No. 14, a house in Rajahmundry, a further point was pressed before us on behalf of the appellant, namely, that only a part of the house was in the occupation of the tenant who had attorned to the mother-in-law and that the other part was in the possession of a lady named Pankajam who refused to attorn to the old lady. In the suit for rent instituted by the plaintiff against these two tenants, the suit was decreed only against the former and not against the latter. It was accordingly contended that at least to the extent of the interest in one half of the house in the possession of Pankajam the plaintiff's suit should be held to be barred by limitation. But if, as we have already pointed out, the principle to be applied is that of Art. 144, it is not sufficient for the defendants merely to suggest that Pankajam had not attorned to the old lady or to the plaintiff. It is only on proof that she had attorned to the first defendant that the plaintiff's suit could be held to be barred even as regards the portion in her possession. The first defendant's evidence is only that some time after 1915 Pankajam paid 10 months' rent in respect of her portion to the first defendant. Even taking this to be true, that is within 12 years of the institution of the suit. We see no reason to differ from the conclusion of the lower Court in respect of items 4 to 10, 11, 12 and 14.

As regards the items disallowed to the plaintiff by the lower Court, we see no reason to interfere with its conclusion

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in respect of items 1, 13 and 15. But in respect of items 2 and 3, we are unable to agree with the lower Court's decision. These items were in the possession of one Chinnain Raju as a tenant under Subba Rao under a lease (Ex. XXVI) executed in 1911. Very soon after Subba Rao's death the plaintiff succeeded in taking a lease in Seetha Bai Ammal's name, that is, Ex. J-10 from one Bapiraju, a brother of Chinnamraju. It is true that if the new lessee was a stranger and the former tenant in possession attorned to the first defendant, the Court may reasonably hesitate to believe that the new tenant got peaceful possession. It is apparently on this assumption that the learned Subordinate Judge observed in paragraph 26 of his judgment that it was difficult to believe that the old tenant gave up possession of these items to Bapiraju. But the evidence of D. W. 4 and Ex. XVIII establish that Chinnamraju, the former tenant, must have died in 1913 or early in 1914 and it appears from Ex. XVIII itself that in February, 1914, it was Bapiraju who sent the rent due in respect of these items to Subba Row. We therefore see no reason to think that it was unlikely that Ex. J-10 represented a real transaction of lease or that Bapiraju would not have got into possession under it. The defendants' story that Chinnamraju's widow Venkatammal was in possession and paid her rent, does not seem entitled to weight in the face of the registered lease executed by Bapiraju and the circumstances above adverted to. We would accordingly set aside the decree of the learned Subordinate Judge in respect of items 2 and 3 and give a decree to the plaintiff in respect of these items as well.

As regards item 15 it will follow from our finding on the question of benami that the title thereto also is in the plaintiff. But the learned Subordinate Judge has not given the plaintiff a decree in respect of that item because in the connected suit O. S. No. 17 of 1929, he held that the present plaintiff had not shown that he had possession of this item within 12 years of the institution of the suit. Apart from the observation we have already made that in the circumstances of the present case the principle of Art. 144 and not Art. 142 should be applied, the learned Judge's observation that the plaintiff was not in possession of this item within 12 years of the institution of the suit seems to rest upon a misapprehension because D. W. 9, the tenant who is alleged to have been in possession

of this item under the first defendant, admits that for at least a year after Subba Rao's death the plaintiff was occupying a portion of this house. We accordingly hold that the learned Judge's finding on the question of limitation even in respect of this item is not correct. But as his decision has been set aside on appeal by the District Court in A. S. No. 9 of 1931, it is not necessary that we should pass a formal decree for possession in the present plaintiff's favour in respect of this item. It will be sufficient if there is a declaration of title in plaintiff's favour in respect of this item.

As regards items 2 and 3 which we have allowed in plaintiff's favour, the plaintiff will also be entitled to mesne profits from the first defendant at a flat rate of Rs. 30 per annum for the three years before suit (1923-1925) and future mesne profits at the same rate from 1926 till delivery of possession of the suit items or until the expiry of three years from this date, whichever happens earlier. We do not, however, think it necesssary to interfere with the direction in the lower Court's decree as to costs. The appeal is dismissed with costs. In the Memorandum of Objections there will be no order as to costs as the parties succeed in part and fail in part.

For the reasons given above S. A. No. 1214 of 1932 is dismissed with costs.

The above appeals having been set down to be spoken to this day the Court delivered the following

JUDGMENT.—(Judgment delivered by *Varadachariar, J.*).

Appeal No. 112 of 1931.

Before the decree in this appeal was finally drawn up, it was brought to our notice by the learned Counsel for the appellants that in dealing with issue 4, the lower Court had omitted to give the appellants credit for payments made by them in respect of public charges like land revenue and cesses. The case was accordingly directed to be posted for being spoken to.

The respondents' learned Counsel points out that the course adopted by the lower Court in paragraph 35 of the judgment was to adopt the figures as to income shown by the lease deeds of a much earlier date though the income relating to the period in respect of which mesne profits were claimed by them prior and subsequent to suit would have been much greater, and that

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the Court, in order to avoid an inquiry preferred to adopt the earlier figures on the understanding however that details of disbursements made by the defendants during the period of their possession need not be taken into account. The parties are not able to agree before us as to the precise basis on which the lower Court proceeded.

Theoretically, the plaintiff is entitled to an inquiry as to mesne profits in respect of the period to which the issue relates and the appellants are entitled to deduction in respect of public charges disbursed by them. Both parties would undoubtedly have saved considerable time and expense if they could have agreed on some figures. But, in the absence of such agreement we have no alternative but to set aside the finding of the Court below on issue 4 and send the case back to the lower Court for an inquiry, in respect of mesne profits in the manner prescribed by law as regards items 4 to 12 and 14. The figures arrived at after such inquiry will be inserted by the lower Court in the place of the figures now entered in its decree. As regards the two other items which we allowed in the appeal, namely, items 2 and 3, our judgment has already fixed the rate and this amount has only to be added to the figure which the lower Court may arrive at.

S. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Minor Narayanasami, Minor Venkaraman by their next friend Janaki Ammal .. *Petitioners** (*Plaintiffs 1 and 2*)

v.

Swaminatha Aiyar and others .. *Respondents* (*Defendants 1 to 14*).

Narayanasami v. Swaminatha Aiyar.

Court-Fees Act (VII of 1870 as amended in Madras), S. 17 and Sch. II, Art. 17-A—Suit for partition of joint family properties—Declaration sought against creditors of father—Relief for exoneration of plaintiffs' share for debts—Court-fee payable—Several declarations sought—Claim within jurisdiction of Munsif but filed in Sub-Court—Basis for determining court-fee—Relief by way of injunction found to be necessary—No court-fee thereon.

The plaintiffs sued for partition of joint family properties belonging to them and their father the first defendant, and prayed for an account of the family properties and for delivery of possession of their share without any liability for the debts in favour of the other defendants. The plaintiffs also sought an injunction against the defendants restraining them from seeking

* C. R. P. No. 275 of 1937. 14th April, 1937.

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any relief against the plaintiffs' share of the family properties. From the allegations in the plaint it appeared that the debts were contracted by the father and that plaintiffs were not parties to the said deeds or documents evidencing the same. No suit in respect of any of the debts, save in respect of a debt due to one particular defendant, were on the date of suit instituted by any of the creditors nor any decrees obtained. The plaintiffs paid proper court-fee on the prayer for partition and account. The question having been raised as to what was the court-fee payable in respect of the reliefs prayed for as against the creditors of the father,

Held, that under the circumstances the relief which the plaintiffs had to seek was a declaration in respect of each of the debts that it was not binding on them and on their share of the properties, and that court-fee was payable thereon under Art. 17-A of Sch. II of the Court-Fees Act, as amended in Madras.

Held also, that on the allegations in the plaint no cause of action was disclosed which could support the relief of injunction and that no court-fee was payable on that relief.

Pindiprolu Perraju v. *Pindiprolu Subbarao*, (1934) 68 M.L.J. 376. I.L.R. 58 Mad. 821, relied on.

S. 17 of the Court-Fees Act does not deal with the forum in which the plaint should be filed. In the case of a declaratory suit under Art. 17-A (i) of Sch. II the court-fee payable is dependent on the Court in which the plaint is presented. Where plaintiffs pray for several declarations and the value of certain of the debts sought to be declared not binding on the plaintiffs is such as to bring the suit within the jurisdiction of the District Munsif, but the plaintiffs file the suit in the Sub-Court, the amount of court-fee payable in respect of each of the declarations is Rs. 100 and not Rs. 15, as the amount of court-fee depends on the Court wherein the plaint is presented.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Mayavaram dated 15th January, 1937, and made in O. S. No. 18 of 1936.

T. R. Venkatarama Sastri, S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Petitioners.

C. A. Seshagiri Sastri, R. Viswanatha Aiyar and *S. Thyagaraja Aiyar* for Respondents.

The Government Pleader (K. S. Krishnaswami Aiyangar) on behalf of the Government.

The Court delivered the following

JUDGMENT.—The question raised in this revision petition relates to the amount of court-fee leviable on the plaint in the suit. The suit is for a partition of joint family properties of the plaintiffs and their father the first defendant. The plaintiffs who are entitled to a two-third share therein seek partition and delivery of their separate share and also an account of the income of the properties. So far as the prayers relating thereto are concerned, the plaint has been properly valued, but the controversy has arisen in regard to the relief they seek in

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respect of the debts contracted by the first defendant. Defendants 2 to 14 are his creditors and the plaintiffs are questioning the binding nature of the said debts. The material allegations relating thereto are as follows:—

"The next friend of the plaintiffs learnt that the first defendant had, even afterwards, been persisting in his former habits and he was giving out that he was indebted to the other defendants to the extent of Rs. 60,000 having borrowed from time to time on promissory notes. He seems further to have stood surety to his son-in-law Vanji Aiyar to the extent of Rs. 30,000 to the ninth defendant. The next friend submits that these debts are not binding on the minor plaintiffs as there was no necessity to borrow on behalf of the family, nor the first defendant had any right to give the surety bond so as to bind the minors . . . . The plaintiffs are entitled to a division of the immovable properties of the family by metes and bounds corresponding to their two-third share and to be put in separate possession of the same without any liability for the debts in favour of the other defendants. They are entitled to an injunction against the defendants restraining them from seeking any relief against the plaintiff's share of the family properties."

The prayer in paragraph 12 (*f*) of the plaint is as follows:—

"That defendants 2 to 14 may be restrained by permanent injunctions from proceeding against the properties of the plaintiffs for the debts contracted by the first defendant."

The relief is valued thus:

"Rs. 1-1-0 for each of the 13 injunctions sought for against defendants 2 to 14 under S. 7 (*iv*) (*d*) and (*f*) of the Court-Fees Act".

The learned Subordinate Judge was of the opinion that the relief should be valued as one for a declaration under Art. 17-A of Sch. II of the Court-Fees Act and directed that a sum of Rs. 2,100 for the thirteen declarations in respect of the debts of the thirteen defendants should be paid. The question is, is this view correct? The principle to be kept in view in determining the proper court-fee is what in substance is the relief which the plaintiffs seek and not the form in which it is couched. From the allegations in the plaint it appears that the debts were contracted by the father and the plaintiffs were not parties to the said deeds or documents evidencing the same. If a suit were to be brought on the said documents, the creditor will have to make out that the debts were such as under Hindu Law would be enforceable against the plaintiffs' share in the joint family properties. No suits in respect of any of the debts save in respect of a debt due to the 12th defendant were on the date of the suit instituted by any of the creditors nor any decrees obtained. In the circumstances the relief which the plaintiffs have to seek is for a declaration that the said

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debts are not binding on them and on their share of the properties. On the allegations in the plaint, no cause of action is disclosed which could support the relief of injunction. The fact that the plaintiffs choose to frame the relief in the form of an injunction would not make an action any the less an action for a declaration. It will be seen that the injunction is claimed as a substantive relief and not as a mere consequential relief. This case therefore would be governed by the decision of Venkatasubba Rao, J., in *Pindiprolu Perraju* v. *Pindiprolu Subbarao*[1] which has been followed by the learned Subordinate Judge and which in the present state of the law I see no reason to differ from. No arguments have been advanced by Mr. Venkatarama Sastri showing that the view of the learned Judge expressed in the said decision is unsound.

I shall now deal with the arguments of Mr. Venkatarama Sastri based on S. 17 of the Court-Fees Act. It is this. Six of the debts are much less than Rs. 2,500 and the suits in respect of them are cognisable by a District Munsiff's Court and therefore the proper court-fee for each of the claims should be Rs. 15. This contention is against the plain language of the section of the Act relied on. S. 17 says :—

> " Where a suit embraces two or more distinct subjects, the fee chargeable would be the aggregate amount of fee to which the plaint in suits embracing separately each of such subjects would be liable under the Act."

This section does not deal with the forum in which the plaint should be filed. In the case of a declaratory suit, under Art. 17-A (i) of the second Schedule of the Act the amount of court-fee payable is dependent on the Court in which the plaint is presented. If the plaintiff chooses to present his plaint in a Sub-Court or a District Court and the claim is cognisable by that Court, the plaintiff will have to pay the stamp duty prescribed for presentation of such a claim in that Court. The claim for a declaratory relief in respect of each of the debts sought to be impeached in this case is cognisable by the Sub-Court in view of the fact that the said relief is claimed in respect of the plaintiffs' share in the joint family properties sought to be recovered in the suit freed from the claims in respect of the said debts. I therefore overrule the contention and hold that the court-fee is Rs. 100 on each of the six debts.

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1. (1934) 68 M.L.J. 376: I.L.R. 58 Mad. 821.

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In the result the Civil Revision Petition fails and is dismissed with costs of Government Pleader. Time for payment of the court-fee extended for a month till after the re-opening of the Court after summer recess.

B. V. V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Ramalinga Goundan ... *Petitioner*.*

Ramalinga Goundan, *In re.*

Indian Arms Act (XI of 1878), S. 19 (f)—Arms and ammunition found in a house belonging to the accused—Defence that the contraband articles were foisted on to his house—Attempt to prove by evidence not successful—Lack of clear evidence to prove the occupation of the house by the accused previous to discovery of articles—Inference of innocence stronger in favour of accused—Ground for acquittal.

Where the accused was convicted under S. 19 (*f*) of the Arms Act (XI of 1878), by the lower Court on the evidence of the prosecution that on the morning next after the previous evening when the petitioner (accused) had been arrested on a charge of murder a miscellaneous collection of arms and ammunition had been found in a house belonging to the petitioner and the defence was that the contraband property must have been foisted into the house by some of petitioner's enemies, but the attempt to prove the defence was found against by the lower Court.

Held, that, in the absence of clear evidence of the prosecution to prove that the petitioner had been living in that house until within a short period before the discovery of the articles, a sufficient element of reasonable doubt was introduced into the case to make it possible that petitioner's plea might be true and to warrant his acquittal.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Coimbatore Division in Criminal Appeal No. 7 of 1937 preferred against the judgment of the Court of the Sub-Divisional First Class Magistrate of Coimbatore in C. C. No. 153 of 1936.

K. S. Jayarama Aiyar for *R. Sadasivam* for Petitioner.

R. N. Aiyangar for the Crown.

The Court made the following

ORDER.—The petitioner has been convicted under S. 19 (*f*) of the Indian Arms Act by the Sub-Divisional First Class Magistrate, Coimbatore, and his conviction has been confirmed on appeal by the learned Sessions Judge. The evidence for the prosecution shows that on the morning of the 9th October, 1936, a miscellaneous collection of arms and ammunition was

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* Cr. R. C. No. 211 of 1937. (Cr. R. P. No. 198 of 1937. — 6th August, 1937.

found in a house belonging to the petitioner at Kuppandam palayam. The petitioner had been arrested on a charge of murder in Coimbatore the previous evening. Except the fact that the arms and ammunition were found in the petitioner's house there is really no evidence for the prosecution and the case against the petitioner depends upon the evidence of the discovery in the house, whether it is of itself sufficient for a conviction or not. The defence was that the contraband property must have been foisted into the house by some one of the petitioner's enemies and an attempt was made to prove by positive evidence that persons had been seen tampering with the roof of the house on the night before the property was seized. Both the Courts have unhesitatingly refused to accept this evidence for the defence and I see no reason to differ from them. They point out the impossibility of any attempt having been made within so brief an interval to foist a case against the petitioner. The Courts below however appear to have laid very much stress upon this failure of the defence, to reach another conclusion, namely, that because the defence put forward was the tampering with the roof within a few hours of the discovery of the property, the petitioner must have himself lived in the house until very shortly before the discovery, and in fact the Courts below seem to me to have proceeded on the assumption that there can have been no possible alternative case between that for the prosecution and that attempted to be proved by the defence. When defence evidence of this kind is rejected, the situation simply is as if the evidence had never existed. If the defence evidence is believed, it would of course rebut the prosecution. If it is not believed, the prosecution is left just where it was before the defence witnesses were called and it cannot be assumed for a moment from the evidence let in by the defence that there is any admission that the petitioner or his family were living in the house until the night before or a day or two before the discovery of the property. The learned Sessions Judge assumes in paragraph 3 of his judgment that the petitioner and his wife were in the house a day or two previously. The petitioner does not say this in any statement of his own and I have found no trace of any possible statement to that effect in the evidence of his wife. No witnesses were called by the prosecution to prove just at what time the petitioner was in residence in this house and the omission to adduce this evidence is of some importance

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when it is remembered that the petitioner was in the habit of staying at no less than three houses. So far as the evidence goes it is impossible to be certain that this house had not remained untenanted for a long period. No doubt the house was locked and would normally be locked. No doubt a grave suspicion is cast upon the owner of the house in a case of this kind, but after all the articles found are not *prima facie* the type of articles which would be kept by a man who wished to shoot with a gun or a revolver without a license. Most of them are quite unserviceable and there is a mass of miscellaneous collection of cartridges some of which might and some of which could not fit the gun or revolver. The property found therefore of itself suggests the possibility that the plea of foisting put forward by the petitioner in this case may not be altogether unreasonable. If there had been clear evidence that the petitioner had been living in this house until within a short period before the discovery, I do not think I would have been justified in interfering with the conviction. But as no attempt has been made to prove just when the accused was last residing in the house I think a sufficient element of reasonable doubt is introduced into this case to make it possible that the petitioner's plea might be true and to warrant his acquittal. I accordingly set aside the conviction and sentence and direct the petitioner to be acquitted and that his bail bonds be cancelled.

K. C. ——— *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Maya Kone .. *Appellant* (Plaintiff)*

v.

Periasami Kone and others .. *Respondents (Defendants 1 to 3 and 5).*

Maya Kone *v.* Periasami Kone.

Hindu Law—Manager—Borrowing for purchase of lands—Family if liable—Ratification by coparceners—Claim to share in them—If enough to constitute ratification.

The Manager of a joint Hindu family cannot render the family estate liable by borrowing money for the purchase of other lands for the family in the absence of a justifying necessity or benefit.

The fact that where the manager was adjudicated an insolvent, the other coparceners successfully asserted their right to a share in the property as joint family properties by stating therein that the properties were purchased in the name of the insolvent and in his capacity as manager of the joint family

* S. A. No. 214 of 1933. 19th March, 1937.

from and out of the joint family funds and that the insolvent had no exclusive right to the properties, is not enough to found ratification, in the absence of a clear allegation and proof that they affirmed the transaction with full knowledge of all the circumstances attending the same.

Appeal against the decree of the Court of the Subordinate Judge of Madura in A.S. No. 56 of 1932, preferred against the decree of the Court of the District Munsiff, Tirumangalam, in O.S. No. 13 of 1930.

K. Rajah Aiyar and *G. S. Venkatarama Aiyar* for Appellant.

W. S. Krishnaswami Naidu for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit instituted by the plaintiff to recover a sum of Rs. 1,300 and interest thereon on a promissory note dated 16th January, 1924, executed in his favour by the first defendant. Defendants 2 and 3 were impleaded as his undivided brothers on the ground that the debt was contracted by the first defendant as the manager of the joint family for family purposes and for the benefit of the family of the defendants. The fourth defendant is the son of the first defendant and as such he is sought to be made liable in addition to his being a member of the joint family. The suit was filed on 3rd October, 1929. To get over the bar of limitation an endorsement of payment by the first defendant dated 10th January, 1927, was relied on. Defendants 2 and 3 pleaded that there was no family necessity to incur the said debt, that they became separate from the first defendant in 1925, and that any payment or acknowledgment of liability thereafter by the first defendant would not save limitation. Both the Courts have concurrently negatived the plea based on division.

The only question therefore that remains for decision is whether the debt was incurred for family necessity or benefit which would render the defendants liable in respect thereof. The material facts necessary for the disposal of the said question are these. On the 5th October, 1919 (Ex. A-1) the first defendant and one Thirumala Nadar became indebted to the plaintiff in the sum of Rs. 580 on a promissory note bearing the said date. The said liability was incurred by the first defendant to accommodate the said Thirumala Nadar and therefore it was in no sense incurred for and on behalf of the joint family of the defendants. The first defendant was also

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indebted in respect of another sum of Rs. 300 on a promissory note (Ex. A-2) executed by him in favour of the plaintiff, which liability was incurred to accommodate his brother-in-law. Therefore this debt also was one which was not incurred for the benefit of the family. On the 21st December, 1921 (Ex. F) Thirumala Nadar executed a mortgage in favour of the first defendant for a sum of Rs. 3,000 in and by which he mortgaged certain immovable property belonging to him. The document recites that Rs. 1,550 was paid in cash and the balance of the consideration was stipulated to be paid for by the first defendant undertaking to discharge the debt due under Ex. 1 in favour of the plaintiff and the other debts of Thirumala Nadar. On the 16th August, 1923, Thirumala Nadar executed two sale-deeds (Exs. G and H) bearing the same date in and by which he conveyed the property mortgaged under Ex. F and other property to the first defendant. Ex. H was for a sum of Rs. 2,500 and it was stipulated therein that the property conveyed thereunder was subject to a mortgage in favour of one Nageswara Ayyar for Rs. 1,400 and the balance was to be in partial discharge of Ex. F. The other sale-deed Ex. G was for Rs. 1,000 in discharge of the balance due under Ex. F. Subsequent to the execution of these two sale-deeds the first defendant executed in favour of the plaintiff Ex. A the suit note for Rs. 1,300 part thereof being Rs. 840 the amount due under Ex. A-1 and part thereof Rs. 460 being the amount due under Ex. A-3. The recital in the said promissory note is to this effect:

"Regarding the promissory note executed by me and Thirumala Nadar on 5th October, 1919 (Ex. A-1), the amount due from me alone under the said pronote upon my purchasing the said Thirumala Nadar's land is Rs. 840."

It will be seen from these transactions that all the loans incurred up to the date of Ex. F by the first defendant were for the benefit of Thirumala Nadar and Ex. F itself was to accommodate Thirumala Nadar. It was for a sum of Rs. 3,000 and a part thereof was advanced out of the joint family funds. The remaining consideration was the liability undertaken by the first defendant for discharging the indebtedness of Thirumala Nadar. It cannot therefore be said that the transaction Ex. F was for the benefit of the joint family. Further, on 16th August, 1923, when the sale-deeds Exs. G and H were taken, Rs. 2,100 only remained due under the mortgage and

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apparently Rs. 900 was paid by Thirumala Nadar. From the evidence it does not appear how and when that sum of Rs. 900 was paid and why the said sum of Rs. 900 was not utilised in the discharge of the liability undertaken under Ex. F by the first defendant. So far as the sale covered by Ex. H is concerned, the property conveyed thereunder was admittedly subject to a prior mortgage. As pointed out by the learned Subordinate Judge, taking the most favourable view of the transactions a sum of Rs. 820 due and payable under Ex. A-1 must be deemed to represent a portion of the sale price payable under Exs. G and H and Ex. A must be deemed to be a borrowing for the said purpose. But it has not been established in this case that the mortgage or the sales were transactions entered into for the benefit of the family. The manager of a joint Hindu family cannot render the family estate liable by borrowing money for the purchase of other lands for the family in the absence of a justifying necessity or benefit. In *Subramania Chetty* v. *Chidambara Mudali*[1] a mortgage of the joint family property was executed by the managing member of the joint Hindu family for the purpose of purchasing other lands for the family; out of Rs. 10,000 paid for the purchase of the property, Rs. 4,000 was borrowed on a mortgage of the joint family property. In a suit on the mortgage, the minor members of the family disputed their liability to pay the debt. Their Lordships Sadasiva Aiyar and Spencer, JJ., following an earlier decision in *Subramania Nadan* v. *Ramaswami Nadan*[2] held that it was not competent for the managing member to mortgage the family lands so as to bind the junior member's share therein and exonerated the minor's interests in spite of the fact that the purchased lands became an accretion to the joint family property. If the principle of these decisions is to be followed, there can be no question that defendants 2 and 3 are not liable for the suit claim. But Mr. Rajah Aiyar contends that defendants 2 and 3 must be deemed to have ratified the act of the first defendant in incurring the suit liability. How he puts this contention is this: The first defendant was adjudicated insolvent in 1927; in insolvency proceedings the defendants 2 and 3 successfully asserted their right to a share in the property purchased under Exs. G and H as joint family properties; and therefore even

1. (1921) 41 M.L.J. 459. 2. (1913) 25 M.L.J. 563.

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though the transactions under Exs. G and H may not have been for any family necessity or benefit, they must be deemed to have affirmed the same and all the liability incurred in connection therewith. But what they stated was that certain properties were purchased in the name of the insolvent and in his capacity as manager of the joint family from and out of the joint family funds and the insolvent had no exclusive right to the properties. So far as the properties purchased under Exs. G and H are concerned, the statement is partly true, as a major portion of the purchase money came out of the joint family funds. I do not see how a claim advanced under such circumstances can be said to amount to ratification. To found a decision on the doctrine of ratification, it must have been clearly alleged and proved that the defendants affirmed the transactions with full knowledge of all the circumstances attending the same. As pointed out by the learned Subordinate Judge in paragraph 6 of his judgment, on the evidence on record it is not possible to find a case of ratification. Mr. Rajah Aiyar asked me to raise an issue on this point and remand the case to the lower Court for a finding thereon. But, as no definite plea of ratification was raised in the pleadings and no evidence specifically directed in regard thereto and as the remand would necessitate fresh evidence, I am not inclined to accede to his request.

In these circumstances, the plaintiff is not entitled to a decree against the joint family properties in the hands of defendants 2 and 3. In my opinion, the decree passed by the learned Subordinate Judge was proper and is similar to the one passed in *Burayya* v. *Ramayya*[1]. In the result the second appeal fails and is dismissed with costs.

Leave to appeal refused.

S.V.V. —— *Appeal dismissed.*

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1. (1923) 46 M.L.J. 49: I.L.R. 47 Mad. 449.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Manapalli Krishnayya .. *Appellant** (*2nd Defendant*)

v.

Kaza Seetharamayya and another .. *Respondents* (*Plaintiff and 1st Defendant*).

Krishnayya *v.* Seetharamayya.

Limitation Act (IX of 1908), S. 19—Partnership—Suit for dissolution—Appointment of one of the partners as receiver—Acknowledgment by him of liability of firm to a creditor—Whether could save limitation even as against the other partners.

Wherein a suit by the second defendant for dissolution of a partnership composed of himself and the first defendant an application during the pendency of the suit was filed by the second defendant for appointment of a Receiver and the first defendant himself was appointed Receiver on an undertaking given by him that in the matter of payment of the debts due to and by the firm he would carefully attend to them without allowing them to be barred by time, etc., and the plaintiff herein pressed for payment of a debt due to him on the ground that it would be barred by time, but the first defendant by a letter acknowledged liability of the firm to the plaintiff without having any regard to limitation, on the questions whether the first defendant as receiver was entitled to acknowledge this debt, and if so, 'whether it would save the suit from getting barred by limitation as against the second defendant.

Held, that the acknowledgment was made to prevent the creditor from filing a suit, and to avoid unnecessary expense to the partnership. Hence the letter would avail as an acknowledgment of liability even as against the second defendant and the claim would not be barred by limitation.

Hale, In re: *Lilley* v. *Foad,* (1899) 2 Ch. 107; *Raja Braja Sundar Deb* v. *Bhola Nath,* (1919) 12 L.W. 288 (P.C.) and *Lakshmanan Chetty* v. *Sadayappa Chetty,* (1918) 35 M.L.J. 571, relied on.

Kilgour v. *Finlayson,* (1789) 1 H. Bl. 155: 126 E.R. 92 and *Abel* v. *Sutton,* (1800) 3 Esp. 108: 170 E.R. 556, distinguished.

Second appeal against the decree of the Court of the Subordinate Judge of Ellore in A.S. Nos. 29 and 33 of 1934, preferred against the decree of the Court of the District Munsiff of Ellore in O.S. No. 801 of 1929.

P. Somasundaram for Appellant.

V. Suryanarayana for Respondents.

The Court delivered the following

JUDGMENT.—The main question argued in this second appeal is one of limitation. The suit is to recover a sum of Rs. 709-7-0 due in respect of dealings had with the first and

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* S. A. No. 704 of 1935. 19th March, 1937.

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second defendants who carried on business under the name of Seetharamanjaneya Rice Mill. The claim would be admittedly barred by limitation but for an acknowledgment of liability contained in the letter Ex. F executed by the first defendant on the 28th October, 1926. The second defendant, who is the appellant in this second appeal, resists the claim on the ground that Ex. F is not binding on him on two grounds: (1) The letter was intended to be executed by both the defendants but it is only signed by the first defendant and therefore inoperative as against him (second defendant). (2) On the date of Ex. F there was a decree for dissolution of partnership made in O. S. No. 244 of 1923 and the first defendant could no longer act for him.

The first contention can be easily disposed of. Though the document was intended to be executed by two persons, at the time of the execution it was agreed that it would be enough if the first defendant executed it as he was the receiver appointed in the said suit and the letter was signed by him as receiver. The view taken by the lower Court in this behalf is correct and I see no reason to differ from it.

To appreciate the second contention a few facts may be necessary. O. S. No. 244 of 1923 was a suit for dissolution of partnership of the said Seetharamanjaneya Rice Mill and in that suit an application was made on the 5th September, 1923, for the appointment of a receiver by the second defendant who was the plaintiff in the said action. The petition ran thus:

> "For the reasons set forth in the affidavit filed therewith, the plaintiff prays for the appointment of a receiver for collecting the assets due to the suit rice mill from others and for payment of the debts due to others and do other acts."

The first defendant in paragraph 3 of his counter-affidavit filed therein stated that in the matter of recovery of the assets due to the firm and in the matter of payment of the debts due by the firm he would carefully attend to them without allowing them to be barred by time and he would recover the debt by filing suits, etc. On the strength of the undertaking given by the first defendant the plaintiff agreed to the appointment of the first defendant as receiver. The order of the Court was "first defendant appointed receiver accordingly", that is, in accordance with the terms of the petition. Therefore the effect of this appointment was that the first defendant was

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appointed receiver for collecting the assets due to the suit rice mill from others and for payment of the debts due to others and to do other acts which I interpret as meaning all acts necessary and incidental for the realisation of the assets and for the payment of debts due by the firm. This was on the 5th October, 1923. The first defendant was discharged from the office of the receiver on the 19th February, 1929. It was during this interval that Ex. F came into existence. The recitals in Ex. F are to the effect that the plaintiff pressed for payment of the debt on the ground that it would be barred by limitation but as the first defendant had not the account books before him, as he could not verify the amount due and as soon as the account books were received from Court he would pay the principal and interest which may be found due in accordance with the account without having any regard to limitation. There can be no doubt that this letter operates as an acknowledgment of liability. The question is whether the first defendant as receiver is entitled to acknowledge this debt, and if so, would it save the suit from being barred by limitation even as against the second defendant? The order appointing receiver distinctly authorises the receiver to make payments of the debts due to others by the firm. If the receiver had made a part payment, it would certainly be within the scope of his authority though the effect of it might be to stop the statute of limitation from running. In *Hale*, In re: *Lilley* v. *Foad*[1] a question arose whether a part payment made by a receiver who was authorised to make payments under a statute towards the debt due in respect of the estate of a mortgagor would save an action to recover the debt from the bar of limitation. The Court of Appeal held in that case that it would and Sir F.H. Jeune, one of the learned judges who took part in the appeal, remarked thus:

"It seems to me that this receiver, in making this payment was acting properly, that is, within the scope of his authority. Then the difficulty in the case vanishes. It is impossible to draw a distinction between a payment as a payment, and a payment as an act from which an inference of a promise is to be drawn, that is, a legal inference. Payment of part of a debt is an acknowledgment that it is part of a debt which has to be paid. It is impossible to draw a distinction between a payment as a payment, and a payment with regard to which there arises the legal inference of a promise to pay the whole debt."

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1. (1899) 2 Ch. 107.

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If the receiver can make a part payment and take the case out of the statute, I do not see any reason why he would not have power to acknowledge the debt. As observed by their Lordships of the Judicial Committee in *Raja Braja Sundar Deb* v. *Bhola Nath*[1], where an agent was authorised to pay the amount of the claim, "he could plainly also arrange to prevent time from becoming a bar to it". In that case the agent executed a renewed promissory note which was held sufficient to save the suit from being barred by limitation. In this case the receiver must therefore be deemed to have made acknowledgment for and on behalf of the partners of the firm. In *Lakshmanan Chetty* v. *Sadayappa Chetty*[2] it was held that where a receiver in an action for dissolution of partnership had authority to do all things necessary for the preservation of the assets of the firm, an acknowledgment of liability made by him in respect of a claim against the partnership was held a sufficient acknowledgment within the meaning of S. 19 of the Limitation Act to prevent the claim being barred against the partners. Their Lordships observe that in many cases an acknowledgment of a debt may be necessary to save the estate from loss and thus necessary for the preservation of the estate. The learned Subordinate Judge in this case finds that the acknowledgment was made to prevent the creditor from filing a suit and to avoid unnecessary expense to the partnership. Therefore I am of opinion that Ex. F would avail as an acknowledgment of liability even as against the second defendant.

I shall now deal with some of the cases relied on by Mr. Somasundaram. *Kilgour* v. *Finlayson*[3] was one of the cases relied on by him. In that case on the dissolution of a partnership one of the partners was authorised to receive all debts owing to and pay those owing from the partnership. He endorsed a bill of exchange in the name of the partnership. It was held that he had not authority to do so and it was conceded in arguments that the action on the bill could not be supported against the other partners. *Abel* v. *Sutton*[4] was a case where on the dissolution of a partnership one of the partners was authorised to settle the affairs of the partnership but this power was held insufficient to negotiate a bill of exchange and

1. (1919) 12 L.W. 288 (P.C.).
2. (1918) 35 M.L.J. 571.
3. (1789) 1 H.Bl. 155: 126 E.R. 92.
4. (1800) 3 Esp. 108: 170 E.R. 556.

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the reason assigned was that no one might make another his debtor against his will. The distinction between these cases and the present is this; the partner in the said cases was incurring a fresh liability, whereas in the present case the receiver was acknowledging a liability already existing. This distinction was noticed in the case in *Abdulalli Badrudin* v. *Ranchodlal Trikamlal*[1] decided by the Bombay High Court. In *Bryant, Powis & Bryant* v. *Quebec Bank*[2] an agent of a company who was authorised to make a contract of sale and purchase under the express terms of a power-of-attorney was held not to have the power to borrow money or bind the company by a contract of loan. The case only illustrates the general principle that a power to bind a principal by a particular act of an agent who was authorised to transact the affairs of the principal under a power-of-attorney must be derived from the instrument and where the power is not expressly conferred or would not arise by necessary implication the principal would not be bound. In the present case under the order of appointment the receiver by necessary implication had the power to acknowledge the debt. The view of the lower Court that the claim against the second defendant is not barred by limitation is correct. In the result, the second appeal fails and is dismissed with costs of first respondent.

Leave refused.

K. C. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD MAUGHAM, SIR SHADI LAL AND SIR GEORGE RANKIN.

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Maharaja Sir Kesho Prasad Singh Bahadur *v.* Mt. Bhagjogna Kuer.

Maharaja Sir Kesho Prasad Singh Bahadur, since deceased now represented by Maharaj Kumar Ram Ranbijoy Prasad Singh .. *Appellant**

v.

Bahuria Musammat Bhagjogna Kuer, since deceased, and others .. *Respondents.*

Limitation—Adverse possession—" Adequacy, continuity and exclusiveness"—Proof of receipt of rent may be indirect—Title to tenancies belonging

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1. (1916) 38 I.C. 873 at 876. 2. (1893) A.C. 170.

* P. C. Appeal No. 19 of 1933. 1st February, 1937.
Patna Appeal No. 33 of 1930.

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to separate estates formed by accretion of land—Admissibility of decree defining estates and map—Entries in Government records—Evidentiary value—United Provinces Act (III of 1901), Ss. 33, 40 and 44—Indian Evidence Act (I of 1872), Ss. 11, 13, 32 (4), 35, 36 and 83—Indian Limitation Act (IX of 1908), Sch. I, Art. 144.

In 1825 an accretion of land formed by the river Ganges altering its course was made into a separate estate, called "Gangbarar". In 1862 more land having emerged to the south of Gangbarar, another separate estate, called "Naubarar" was formed and settled with the owner of Gangbarar. In 1903 Naubarar was sold for arrears of land revenue and purchased by the predecessor in title of the present appellant. In 1915 both the present respondents purchased two separate interests each in Gangbarar, and thus each derived title as co-sharer to a subdivision of Gangbarar. Tenants of lands near to the river Ganges having taken proceedings, under S. 149 of the Bengal Tenancy Act, the present suits were brought raising the question of title whether the land of the tenancies in suit belonged to Gangbarar or to Naubarar, and the question consequently arose whether the land lay within one mahal or another. In 1911 the appellant brought a suit against certain co-sharer maliks of Gangbarar claiming tract of land as belonging to his estate of Naubarar, and in that suit the predecessors in title of the present respondents were not impleaded. The Commissioner appointed in that case drew a map showing the boundary between the two estates, and that map was ultimately the basis of a decree in the suit made in 1916. In 1917 there came into existence entries in public records consequent upon the decree of 1916. The appellant pleaded that he acquired a new or independent title in 1917 by reason of the proceedings to revise the revenue.

Held, (1) the Commissioner's map was not evidence against the respondents and was within S. 83 and not S. 36 of the Indian Evidence Act;

(2) The question of the limits of a particular revenue mahal was not a matter of public right or public or general interest, so as to come within S. 32 (4) of the Evidence Act;

(3) The judgment of 1916 together with the plaint which preceded it, and the steps in execution which followed, were evidence of an assertion by the appellant of the right he claimed to have acquired in 1903 and were admissible evidence of such right; but it added little or nothing that having got decree the appellant took symbolical possession, or even that he set up boundary pillars; and the rights of the respondents were not in any way affected;

(4) A judgment against a third party would not alter the burden of proof as between rival claimants;

(5) The entries in the registers kept under the United Provinces Land Revenue Act (III of 1901) were admissible under S. 35 of the Indian Evidence Act. Entries however in such Government records would be evidence of title mainly because they were good evidence of possession, but if they should be contrary to the facts as to possession at the time they were made, they would carry little weight;

(6) As regards the plea of adverse possession, any possession which the old proprietors might have exercised after the revenue sale of 1903 would be adverse to the purchaser provided they proved that they continued in possession. Proof of receipt of rent from the tenants notwithstanding sale would be necessary, but such proof may be indirect, such as public records showing that A.B. was in possession of the maliki interest. The circumstances that

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Maharaja Sir Kesho Prasad Singh Bahadur v. Mt. Bhagjogna Kuer.

the appellant was not in possession nor in receipt of rent, were insufficient to warrant a finding of adverse possession under Art. 144 of the Limitation Act, and on the materials produced the possession of the respondents had not "all the qualities of adequacy, continuity and exclusiveness" necessary to displace the appellant's title.

Duchess of Kingston's Case, (1776) 2 Howell's State Trials, 538 (N.) and *Natal Land, etc., Co.* v. *Good*, (1868) L.R. 2 P.C. 121 at 133, applied.

Gujja Lall v. *Fatteh Lal*, (1880) I.L.R. 6 Cal. 171 (F.B.); *Denomoni* v. *Brojo Mohini*, (1901) 12 M.L.J. 83: L.R. 29 I.A. 24: I.L.R. 29 Cal. 187 (P.C.) and *Ram Ranjan Chuckerbutty* v. *Ram Narain Singh*, (1894) 5 M.L.J. 7: L.R. 22 I.A. 60: I.L.R. 22 Cal. 533 (P.C.), referred to.

Decision of the Patna High Court modified.

Consolidated appeals from a judgment and five decrees of the High Court of Judicature at Patna, dated 5th August, 1930, which reversed the appellate judgment and decrees of the second Subordinate Judge of Shahabad dated 8th March, 1926, and restored the judgment and decree of the first Munsiff at Buxar, dated 30th August, 1924.

A. M. Dunne, K.C. and *J. M. Pringle* for Appellant.—The decision of the Munsiff, that the appellant's title, *qua* the tenancies, in question, had become extinguished by the adverse possession of the respective respondents No. 1 cannot be justified. The title, being with the appellant, adverse possession adequate in continuity, publicity and extent, must be established in order to extinguish it. Refers to *Wali Mohammad* v. *Mohammad Bakhsh*[1]. The entries in the appellant's favour in the Land Registration Books and in the settlement proceedings and the consequences of the suit of 1911 have combined to establish on an unassailable foundation, not only his title, but his possession over the estate as a unit. Adverse possession cannot be said to run against the appellant before April, 1916, when the identity of Naubarar was after a long lapse of time clearly established. The respondents had failed to prove possession and the title being with the Raj there cannot be any presumption of possession in favour of persons without title. It is not permissible to tack together the possession of trespassers for the purpose of claiming adverse possession.

J. E. Godfrey for Respondents.—The appellant has not established possession in 1903 of the land in suit. The respondent's possession became adverse in 1903. The continued possession of the respondents and their predecessors is admitted by the appellant and proved by the rent decrees and receipts. Such possession has never been interrupted by dispossession and, therefore it was

1. (1929) 59 M.L.J. 53; L.R. 57 I.A. 86: I.L.R. 11 Lah. 199 (P.C.).

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continued. Refers to *Jobeda Khatun* v. *Tulsi*[1]. A person in possession without title can transfer his interest to another who is entitled to tack on the previous period of possession to his own. Refers to *Ram Piari* v. *Budh Sen*[2].

1st February, 1937. Their Lordships' judgment was delivered by

SIR GEORGE RANKIN.—In this case five appeals remain to be decided, seven having been compromised. The plaintiff in suit No. 106 (appeal No. 35) was Bahuria Musammat Bhagjogna Kuer and the principal defendant was the then Maharaja of Dumraon. In the other four suits the Maharaja was plaintiff and the principal defendant was Babu Ramsarup Singh, Musammat Bhagjogna's husband. These original parties have all died and their place has been taken by representatives, but these changes in the record may be disregarded for the sake of brevity in expression. The suits arose out of proceedings taken by the tenants of certain agricultural lands near to the River Ganges and to the border line between the district of Shahabad in Bihar and Orissa and the district of Ballia in the United Provinces. By S. 149 of the Bengal Tenancy Act a tenant, if sued for rent by a person whose title to the rent he does not admit, may pay the money into Court with a plea that the rent is due to a third person. The Court thereupon gives notice to the third person with a view to his bringing a suit against the plaintiff and obtaining an "order restraining payment out of the money." In the case of the five tenancies with which the present case is now concerned, the suits so brought raised the question of title to the lands of the tenancies, and were not confined to the question of the right to a particular amount of rent deposited.

The controversy between the Maharaja on the one hand and Bhagjogna and Ramsarup on the other hand, arises out of the fact that in the district in question the River Ganges has altered its course from time to time. Originally, on the northern bank, and in what is now the United Provinces of Agra and Oudh, there was a revenue-paying estate called Mahal Sheopur Diar. As land accreted to this estate by the recession of the river towards the south another estate was settled called Sheopur Diar Numberi. In 1825 a further accretion of a large

1. (1922) 36 C.L.J. 472. 2. (1920) I.L.R. 43 All. 164.

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quantity of land had taken place and this in turn was made into a separate estate, Sheopur Diar Gangbarar (hereinafter called Gangbarar). The river continued to alter its course to the south and by 1851 still further accretion had taken place. At some date between 1851 and 1862 it returned to the north, flowing through the middle of Gangbarar, as indeed it still does. More land having thus emerged to the south of Gangbarar, a separate estate, Sheopur Diar Naubarar ("Naubarar") was formed in 1862 and settled with the owner of estate Gangbarar to which it had accreted. The main question at issue is: What land was thus settled in 1862? And it arises from the fact that in 1903, the proprietors of Naubarar having defaulted in payment of land revenue, the estate Naubarar was sold for arrears of revenue under the provisions of the Bengal Land Revenue Sales Act (XI of 1859) to a purchaser acting on behalf of the then Maharani of Dumraon. The rubakari, dated 11th September, 1903, confirming the sale under S. 27 of the Act has been put in evidence, and from this it appears that the subject-matter of the sale was "number 1504 Shibpur Diar Naubarar, parganah Bhojpur." By virtue of this purchase by his predecessor, the Maharaja of Dumraon claims to be entitled to the superior interest in the whole of Naubarar whatever its boundaries may be, and he claims that those boundaries include the lands of the tenancies which form the subject-matter of the five suits now before the Board.

Ramsarup, on the other hand, on the 23rd March, 1920, and his wife Bhagjogna on the 8th December, 1915, purchased an interest in the estate Gangbarar. In this way each derives title as a co-sharer to a sub-division of Gangbarar Bhagjogna being co-sharer in patti Sheo Bux Singh and Ramsarup in patti Naunhid Singh. The lands of Gangbarar from long before 1903 have been distributed among some 17 pattis, and lands of each patti are also allocated to particular co-sharers in respect of their interest in the patti. Thus, for example, in Musammat Bhagjogna's suit she claims to have an interest of 1 anna 4 pies in patti Sheo Bux Singh, represented by a half interest in a Takhta of 2 annas 8 pies to which belong the lands comprised in her suit and held by the tenant defendants therein. She thus claims half the rent of these lands. The question of title is whether the land of the tenancies in suit belongs to Gangbarar or Naubarar, and if this question has to be

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answered in favour of the Maharaja a further question arises for decision under Art. 144 of the Limitation Act of 1908, namely, whether the title which the Maharaja obtained by his purchase in 1903 has not come to an end by reason of the adverse possession of Bhagjogna and Ramsarup or their predecessors in title.

At the hearing of the suits the Maharaja was not able to call any evidence of the receipt by him of rent from any of the lands in question at any time since the purchase in 1903.

On the question of title the Munsif appointed a commissioner to find out which of the lands in the 12 suits then before him lay in Naubarar and which in Gangbarar, and by the writ of commission he directed the commissioner to decide this question by re-laying the map made by a Mr. Parker in 1912. The Maharaja in 1911 had brought a suit (No. 274 of 1911 afterwards numbered suit No. 4 of 1913), against a large number of co-sharer maliks of Gangbarar claiming a large tract of land as belonging to his estate of Naubarar. In that suit, however, the predecessors in title of Bhagjogna and Ramsarup were not impleaded. Mr. Parker, then district engineer of Shahabad, having been appointed commissioner in that case, heard evidence and made enquiries as a result of which he drew a map showing the boundary between Gangbarar and Naubarar. This map was ultimately the basis of the decree in the suit, a decree made in 1916 and confirmed by the High Court at Patna in 1919. An appeal to His Majesty in Council (No. 91 of 1923) was dismissed in 1925 "on the ground of incompetency" as an appeal against concurrent findings of fact. The controversy in the 1911 suit upon the maps and other documents which came into existence in 1862 and prior thereto may be stated as follows: Gangbarar, settled in 1825, was 13,977 bighas, 15 kathas. Its most southern plot, according to a map of 1840, was plot 920. In 1861 the whole area was found to be 16,855 bighas, 5 kathas, an addition of 2,877 bighas, 10 kathas. From this additional area a deduction was made of 2,307 bighas, 18 kathas "on account of the river and bhagar," of which 1,923 bighas was for the river and 384 bighas, 18 kathas for uncultivated bhagar, etc., leaving 569 bighas, 12 kathas. This is charged as worth Rs. 4 per bigha (Rs. 2,278-6-0) less Rs. 70-14-0 as "rasum putwari"=

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Rs. 2,207-8-0 of which one half is Rs. 1,103-12-0, say Rs. 1,104. Now the river had by change of course covered lands of Gangbarar and the maliks had a claim for reduction in respect that the whole of their original 13,977 bighas, 15 kathas no longer existed above water. The question in the suit of 1911 was whether Naubarar settled in 1862 was 940 bighas only (of which 569 bighas, 12 kathas were cultivated and 384 bighas, 18 kathas were not), Gangbarar land extending southwards far enough to make up the 13,977 bighas, 15 kathas, or whether Gangbarar stopped at plot 920 as before, the whole of the land to the south of that plot being given to Naubarar, though the revenue was assessed on 569 bighas, 12 kathas only, the maliks of Gangbarar and Naubarar being the same. The High Court, in 1916, held that Naubarar comprised 2,877 bighas south of plot 920, and that this was only assessed as 569 bighas by way of effecting a remission of the revenue payable on Gangbarar due to the maliks for diluvion. Of course, if this be right, any further accretions to the southward would belong to the maliks of Naubarar—that is, after 1903 to the Dumraon Raj, which as it happened owned the villages to the south. That the assessment of 1862 should have been made on the principle just stated is not perhaps very probable *a priori.* After 1903 it produced a remarkable result, and one cannot deny that there is room for dispute upon the matter. But on an elaborate review of the evidence and of the documents the Court arrived at that conclusion and there is no apparent force in the comment that the judgment gave the Raj 2,877 bighas and th emap gave over 4,000. It does appear, however, from the High Court's judgment that the effect given by that Court to the settlement of 1862 was not the effect which certain revenue officials (tehsildars) gave to it in 1867. In 1903 and afterwards, as more than one learned Judge has in the subsequent litigations observed, there was " a good deal of confusion as to the exact location and extent of Naubarar " and their Lordships think it clear that by reason thereof the Raj was not put by the collector in 1903 in possession of the lands of the 1911 suit or of the present suits.

In the present case the Munsif having directed that Parker's map should be taken as the basis for deciding whether the land in suit lay in Naubarar or not, and the commissioner having reported that the lands now in question in the five suits

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before their Lordships were within the limits of Naubarar, the Munsif held that the Maharaja had proved his title to such lands subject to the question of adverse possession. On the question of adverse possession, however, he found that Bhagjogna and Ramsarup and their predecessors in title had proved adverse possession for more than 12 years and that accordingly the title of the Maharaja under the purchase of 1903 had come to an end.

The cases went on appeal to the Subordinate Judge who agreed with the Munsif's finding in favour of the Maharaja's title but considered that the documents relied upon by Bhagjogna and Ramsarup were insufficient to establish adverse possession for the necessary period. On appeal to the High Court of Patna (Ross and Scroope, JJ.) it was held that the Maharaja had not proved that the lands in suit were within the boundaries of Naubarar and therefore failed on the question of title. The decision of the Subordinate Judge on the question of adverse possession was also reversed notwithstanding that the powers of the High Court were limited in the manner set forth by Ss. 100 and 101 of the Civil Procedure Code.

On behalf of the Maharaja it was argued that the decree of 1916 and Parker's map, though not binding upon the principal respondents in the present cases, were evidence against them of the boundary of Naubarar under Ss. 11 or 13 of the Indian Evidence Act, and that the symbolical possession given under the decree in the previous suit was given openly and was marked by boundary pillars set up in the neighbourhood to mark the boundary line. In addition it was said that in 1917, when the terms of the existing settlement of Government revenue were due to be revised, the Maharaja, as the result of proceedings of which the Gangbarar maliks including the principal respondents had notice, became liable for revenue to Government upon the basis of Parker's map and for the whole of the lands delineated therein as comprising Naubarar, and that at the same time the revenue assessed on Gangbarar was reduced.

Since the Maharaja obtained his decree in 1916, three apportionment cases have been decided, that is, suits (or groups of suits) brought by him claiming apportionment of rents due

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from tenants of lands lying partly in Gangbarar and partly in Naubarar as delineated by the decree. In two of these cases (No. 839 of 1918 and No. 340 of 1920) the claim failed as against Gangbarar maliks not parties to that decree, on the ground that it was not evidence against them and on the ground that adverse possession had in any case brought to an end the title of the Raj [cf. *Maharaja Bahadur Kesho Prasad Singh* v. *Ramdeal Kuer*[1] and *Kesho Prasad* v. *Kirtarath*[2]]. In one of these two cases both Ramsarup and Bhagjogna were parties, and the Munsif in his judgment stated that on their behalf revenue chalans had been filed besides a host of decrees and plaints showing that they and their predecessors brought rent suits and got decrees [*cf.* Ex. E (22)]. The third case (No. 88 of 1922) concerned a plot of 52 acres out of which the Maharaja claimed some 43 acres as situated in Naubarar. A commissioner was appointed to ascertain how much of the tenancy lands were within Naubarar and for this purpose he decided to accept the line of Mr. Parker marked by pillars. Musammat Bhagjogna was one of the defendants: Ramsarup was not. The learned District Judge on first appeal [*cf.* Ex. A (41)] considered that Parker's map was evidence in itself as the maker was dead and also because the revenue had been assessed in 1917 upon the basis of it; also that the judgments in the 1911 suit were admissible in evidence under S. 13 of the Evidence Act. This judgment of 9th November, 1923, is in itself of no great importance for the present purpose since the High Court on second appeal proceeded on different grounds, but it influenced the Munsif in the suits now before the Board, who quoted it (30th August, 1924) as justifying him in proceeding upon the basis of Parker's map. The High Court (cf. *Mt. Dharichna Kuar* v. *Keshava Prasad Singh*[3]) which had to deal with this question of fact on the footing that the decision of the District Judge was final save for error in law, ultimately ruled that the commissioner's finding as to area should be upheld. Without deciding whether Parker's map was evidence against the defendants who had not been parties to the suit of 1911, the High Court proceeded on the ground that there was

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1. (1924) 6 P.L.T. 214. 2. A.I.R. 1926 Pat. 577.
3. (1926) 8 P.L.T. 129.

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other evidence before the amin which could support his finding. The erection of boundary pillars without objection and the revenue documents of 1917 were the items of other evidence mentioned.

The decree of 1916 was also followed by a suit for mesne profits (No. 265 of 1916) in which an enquiry was held as to which lands within the boundaries defined by the decree were in the possession of proprietors who had been made parties to that suit and mesne profits were allowed in respect of such lands only. No mesne profits were given for any lands of the present suits.

Before the Board as before the High Court the Maharaja relied upon certain registers kept under the United Provinces Land Revenue Act (III of 1901) as containing entries which are not only evidence in his favour but carry a statutory presumption of correctness upon the question whether the suit lands are within Naubarar. Certain sections of that enactment (including Ss. 33 and 40) are referred to in the judgment of Ross, J. and Scroope, J., has observed that there does not seem to be any presumption of correctness attached to khesras and khatiaunis under the Act. Clause A of S. 32 refers to "a register of all the proprietors in the mahal including the proprietors of specific areas specifying the nature and extent of the interest of each." By S. 33 (3) read with S. 35 no change is to be made in respect of such entries save by order of the Collector or, in undisputed cases only, of the Tehsildar. By S. 40 all disputes are to be decided on the basis of possession, and by S. 41 boundary disputes are to be decided if possible on the basis of survey maps; if this be not possible then on the basis of actual possession. Under this section if it is not possible to decide as to possession, the person "best entitled" may be recorded. S. 44 provides: "All entries in the annual registers made under sub-S. (3) of S. 33 shall be presumed to be true until the contrary is proved."

It was contended on behalf of the Maharaja that the respondents must have accepted the correctness of Parker's map at the time when the order was made in the present suits for the appointment of a commissioner. The application for the commission and the writ of commission, are absent from

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the printed record before their Lordships; but the order of the Munsif dated 13th May, 1924, and the commissioner's report have been obtained and in view of these documents, the pleadings of the parties and the history of the dispute their Lordships find it impossible to hold that the respondents had given up the contention that Parker's map was wrong and was in no way binding upon them—a contention which was indeed their main plea. The Munsif discussed the law of the matter in his judgment and took the view that the decree of 1916 was admissible as evidence against the respondents in a passage which is inconsistent with the suggestion that the respondents had submitted to be bound by it. It becomes necessary, therefore, to consider carefully whether there is proper proof as against the principal respondents that the lands now in suit lie within the Maharaja's estate of Naubarar.

It is convenient to consider first whether the Maharaja can succeed upon the basis that to all the lands comprised in his decree of 1916 he acquired a new, or independent, title in 1917 by reason of the proceedings to revise the revenue. This is faintly indicated at the end of paragraph 7 of his plaints, and the only evidence put forward in support of it seems to be the note inserted in the D Register (Ex. A-38) of Naubarar. The contention has been dealt with more than once in the previous suits, and in their Lordships' view there can be no doubt that it is bad. There is no evidence of anything more than a revision of the amount assessed upon the mahal Naubarar as formed in 1862; and, if reference be made to the judgments in the suit of 1911 for the history of these estates, it will be seen that, according to the case of both sides and the documents put forward, the maliks of Gangbarar and the Maharaja as malik of Naubarar have permanent interest in their respective estates though by reason of special circumstances the revenue is not permanently fixed. The note made upon Ex. A is not the record of, or primary evidence of anything decided by the Revenue Court of Ballia District but is a note made for the purposes of the Shahabad authorities in carrying out the new arrangement.

Before the Board the argument was put as a case of estoppel. It is said that the respondents stood by when in 1917, on the strength of his decree, the Maharaja's revenue

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was enhanced: indeed that at the same time the assessment on Gangbarar or certain parts of it was reduced. As the Maharaja had obtained possession of large tracts of land from certain Gangbarar maliks it is not surprising that in due course his assessment was revised and increased; but that Ramsarup and his wife were responsible for this by action or inaction in any way is neither proved nor probable. It is difficult to discover any basis of evidence for the suggestion of estoppel, which appears to be rested mainly upon the fact that the revision of revenue is made "in the presence of all the proprietors" (*see* paragraph 9 of the Maharaja's written statement). In their Lordships' view the Munsif and the High Court have rightly rejected these contentions as to the effect of the proceedings of 1917. Whether in the course of such proceedings or as a consequence thereof any entry has been made in a register so as to be evidence in favour of the Raj or even to carry a presumption of correctness are separate questions.

The map made by Mr. Parker—if looked at simply as a map and apart from the decree of 1916 and from the physical existence of pillars erected on the land in accordance with it—is not evidence against the respondents. The question of the limits of a particular revenue mahal is not a matter of public right or public or general interest so as to be within S. 32 (4) of the Evidence Act, nor is Parker's map a published map generally offered for public sale or a map made under the authority of Government within S. 36. It is on the contrary within the provision of S. 83 that maps made for the purposes of any cause must be proved to be accurate.

The admissibility of the decree of 1916 is the next question. Whether based upon sound general principle or merely supported by reasons of convenience, the rule that so far as regards the truth of the matter decided a judgment is not admissible evidence against one who is a stranger to the suit has long been accepted as a general rule in English law. Exceptions there are but the general rule is not in doubt. A well-known statement of it was given by Sir William de Grey (afterwards Lord Walsingham) in the *Duchess of Kingston's case*[1] and a striking instance of its application by the Board may

1. (1776) 2 Howell's State Trials, p. 538 (N.).

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be seen in *Natal Land, etc., Co.* v. *Good*[1]. That the same rule applies in India though it is not expressly formulated in these terms may be seen from a reference to S. 43 of the Indian Evidence Act, 1872, and the illustrations given thereunder. On the other hand apart from all discussion whether a judgment is or is not a "transaction" within the meaning of S. 13 of the Evidence Act [cf. *Gujja Lal* v. *Fatteh Lal*[2] and *Dinomoni* v. *Brojo Mohini*[3]] the judgment of 1916, together with the plaint which preceded it and the steps in execution which followed, are evidence of an assertion by the Raj of the right which it claims to have acquired in 1903 and are thus admissible evidence of the right. There are undoubtedly cases in which a judgment is evidence of weight even against third parties. Thus in *Ram Ranjan Chuckerbutty* v. *Ram Narain Singh*[4] a decree 80 years old dismissing a suit on the ground that the defendants had mokarai tenure, was cogent evidence of their ancient possession, of the rate of rent paid, and of their title having been long ago asserted successfully. And in *Dinomoni* v. *Brojo Mohini*[3] magisterial orders under S. 145 of the Criminal Procedure Code were held to be admissible for and against every one when the fact of possession at the date of the order has to be ascertained. But the fact that a person not in possession of the land now in suit claimed in 1911 to have been entitled to it since 1903, is not by itself serious evidence of his right. There is and was no lack of assertion on the other side. It adds little or nothing that having got decree he took symbolical possession (dakhaldahani) or even that he set up boundary pillars well to the north of the land now in suit. The respondents could not prevent his doing these things and their rights are not in any way affected by them. Of course if it could be said that had the respondents the right they claim they would have at once challenged these acts by bringing a suit for a declaration of their title—some weight might be attached to the fact that they did not. But in the present case such an argument would be quite hollow. It is difficult to think that any Court would grant relief upon the sole basis of the plaintiff's assertion made against other parties and because the parties now impleaded waited to be sued. That on this basis

1. (1868) L.R. 2 P.C. 121 at 133. 2. (1880) I.L.R. 6 Cal. 171 (F.B.).
3. (1901) 12 M.L.J. 83: L.R. 29 I.A. 24: I.L.R. 29 Cal. 187 (P.C.).
4. (1894) 5 M.L.J. 7: L.R. 22 I.A. 60: I.L.R. 22 Cal. 533 (P.C.).

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alone possession should be disturbed would be indefensible especially in Ramsarup's cases seeing that he was recovering decrees for rent in 1919 and 1920. Their Lordships find themselves in agreement with the observation of Ross, J.:—

"The judgment is not *inter partes*, nor is it a judgment *in rem*, nor does it relate to a matter of a public nature. The existence of the judgment is not a fact in issue; and if the existence of the judgment is relevant under some of the provisions of the Evidence Act it is difficult to see what inference can be drawn from its use under these sections."

Serious consequences might ensue as regards titles to land in India if it were recognised that a judgment against a third party altered the burden of proof as between rival claimants, and much "indirect laying" might be expected to follow therefrom.

A very important feature of the case must here be borne in mind. The evidence before the Board does not enable their Lordships to see how near in each case the lands now in dispute lie to the boundary line drawn in 1916, but in three of the suits against Ramsarup the plaint lands were found by the Commissioner to include some lands of Gangbarar, which would seem to involve that the lands now in question in these suits are at the very extremity. In the two other suits also this may very well be the case. Accordingly it is anything but certain that any of the defendants in the previous suit had an interest even indirectly in the exact line drawn at these particular points. The lands now in suit are only small areas out of the large tracts then disputed and lie in all probability on the outside edge thereof.

So far as Ramsarup is concerned, whether or not he has proved possession for 12 years adverse to the Maharaja, their Lordships consider that he has proved that he was in possession of the maliki interest which he claims at the time when the Maharaja brought these four suits against him in August, 1923. Apart from any antecedent probabilities arising from the fact that the Maharaja had never had possession, or from the fact that the lands now in question were excluded from the decree for mesne profits as being held by a Gangbarar malik not party to the suit of 1911, he has proved in three of the suits that he had recently recovered rent decrees: and, though in suit No. 111 there was no such special evidence, he gave oral evidence before the Munsif (not included in the paper-book), produced his sale-

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deed of 1915 and a certified extract from katiauni jamabandi for 1917 showing the tenant defendants of that suit (No. 111) recorded as holding under his share of the patti Naunidh Singh [Ex. E-21]. In these four suits the Maharaja is really a plaintiff suing in ejectment and must give proper proof of his title as against a defendant in possession. The position of Bhagjogna is different.

No doubt in 1917 there came into existence entries in public records consequent upon the decree of 1916. These entries are admissible under S. 35 of the Evidence Act, but, as Ross, J., has pointed out, the entries to be made under the United Provinces Act III of 1901 are intended to be based upon the facts as to possession (S. 40) and it is plain enough that the Raj was not in possession of the lands now in suit. On their merits as evidence these entries add nothing. Apart from the particular provisions of Act III entries in such Government records are evidence of title mainly because they are good evidence of possession, but if contrary to the facts as to possession at the time they were made they carry little, if any, weight. This would be specially applicable to entries made by the tehsildar as of routine and without notice to any parties interested to oppose their being made.

In the argument before the Board it was suggested that the learned Judges of the High Court had altogether failed to notice S. 44 of the United Provinces Act (III of 1901) but their Lordships do not so read either of the two judgments. The paper-book prepared for the purposes of this appeal contained no document, carrying a statutory presumption of correctness, to which the appellant could point as containing a statement to the effect that the lands now in suit are part of the mahal Naubarar. A main purpose of the opportunity given by their Lordships at the end of the hearing on 28th July, 1936, for the addition to the paper-book of further documents was that the appellant might lay before the Board any entry made under S. 33, sub-S. (3) of Act III to which he could point as containing that statement. Such entries alone attract the statutory presumption of correctness under S. 44 of the Act.

No such entry appears among the further documents since obtained from India. Hence even if it be assumed that the

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presumption would remain when the facts as to possession were established the appellant can take no advantage from S. 44.

Their Lordships have not merely to consider whether there is some evidence in support of the view that the suit lands lie within the Maharaja's mahal of Naubarar. The learned Subordinate Judge, in coming to his finding of fact upon this point in agreement with the Munsif, does not appear to have observed that the commissioner was directed to accept Parker's map as correct, and did not in their Lordships' view direct himself accurately as to the purposes for which the map could be used as evidence against the respondents. The High Court in their Lordships' view was entitled to entertain afresh this question of parcels notwithstanding that they were exercising jurisdiction in second appeal. The question now is whether the High Court are shown to have been wrong in their finding. Their Lordships are of opinion that they arrived at a correct conclusion upon this part of the case. Indeed in the circumstances of the case it was hardly reasonable on the part of the Raj as plaintiff in the four suits against Ramsarup to expect to succeed without proving afresh as against him the particulars of the settlement of 1862 when Naubarar was formed into a separate estate.

As already noticed the position of Bhagjogna is different from her husband's. In suit No. 106 she is plaintiff and it is for her to prove her title to the lands of that suit. She claims a half interest in a plot of some 5 bighas let out to tenants at a rental of about Rs. 42 per annum. The khewat for 1921 (D-10) is produced and item No. 6 shows her purchase in 1920 of a share (1 anna, 4 pies) in patti Sheo Buksh Singh the rental being given as Rs. 45-1-10. This very same interest was excluded in 1919 from the mesne profits suit as appears from section B to the commissioner's report therein [Ex. 3]. The Munsif relied on Exs. D-1, D-2 and D-4 which are khesras and a "Jild Bandobust" (D-3) which are either not included or are not identifiable in the paper book; he appears to have considered that one Jaigeshri Lal was a vendor to Bhagjogna in respect of the lands of suit 106, and he referred to two decrees obtained by him for rent in 1890 and 1895; also a plaint in 1890 in a rent suit. Their Lordships have, however, been unable to discover any proof that Jaigeshri Lal was a predecessor in title of Bhagjogna or

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that the plaint and decrees have any reference to the lands of this suit, these somewhat ancient matters being all strenuously denied on behalf of the Maharaja. From her plaint it appears that Bhagjogna herself cannot have collected any rent from these lands because in answer to the Maharaja's rent suit in 1922 the tenant defendants deposited the rent from 1919-22. In her title deed of 8th December, 1920 (Ex. D) her vendors explain that the lands sold were sandy and unprofitable. It is fair to add that her husband appears from the Munsif's judgment to have given oral evidence on her behalf, and might and should have been cross-examined on the objections now taken to her title. His evidence, however, has not been included in the paper-book. The Munsif and Ross, J., gave some weight to the fact that in a previous suit about apportionment of the rent of other lands, she put in evidence chalans, plaints and decrees showing possession by her vendors; but it is difficult to assume that they would be found to have reference to the lands of the present suit (No. 106) or to see that she has any valid excuse for not producing them once more.

In this state of the evidence their Lordships think it impossible to hold that Bhagjogna as plaintiff has proved her title as against the Maharaja. Whether the interest which, in 1920, she purchased in patti Sheo Buksh Singh or the interest which, in 1903, the Maharaja purchased in mahal No. 1504 gives title to the land in suit depends entirely upon the question whether the land lies within the one mahal or the other. She as plaintiff must produce proof upon this point unless she is to succeed entirely on the ground of adverse possession. It may be—their Lordships do not decide—that, so far as regards the mere claim to the deposited rents for 1921-22, she could succeed by giving proof of possession of the maliki interest in the particular lands of her suit and relying upon the Maharaja's failure to prove his title (cf. *Jadub* v. *Sm. Khemankari*[1]). But her evidence of her predecessor's receipt of rent from the lands of suit 106 is of the most tenuous and dubious character and quite insufficient for this purpose.

Upon the question of adverse possession their Lordships being concerned only with five suits have a more limited

1. (1903) 8 C.W.N. 248.

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enquiry than that which was necessary before the Courts in India. Having found that prior to the sale in 1903 the respondents' predecessors, maliks of Gangbarar, were in possession of the lands now in question, Ross, J., expressed his view thus:—

"The Raj not having taken delivery of possession after the revenue sale, the presumption is that possession continued as before, and this presumption is borne out by the fact that a suit for possession was brought in 1911 and also by the pleading, in paragraphs 5 and 6 of the written statement (of the Maharaja), that he got into possession of the property in dispute by bringing a suit in Court."

Their Lordships cannot agree that this approach to the present question is accurate. If it be once shown that the lands in dispute passed by the revenue sale of 1903 there can in law be no presumption that, contrary to the purchaser's rights, the old proprietors remained in receipt of rent from the agricultural tenants. Any possession which the old proprietors may have exercised after the sale would no doubt be adverse to the purchaser, but they must prove that they continued in possession and it does not appear that it is possible for them to prove possession save by proving that they received rents from the tenants notwithstanding the sale. No doubt; if at some date rent was received by them in respect of a previous period subsequent to the sale, a question may arise whether this receipt does not evidence possession by the tenants on behalf of the old proprietors since the date of the sale; but proof of receipt of rent would seem to be necessary if the old proprietors are to make out a case that the purchaser's title has come to an end by reason of their adverse possession. It is important, however, to notice that proof of receipt of rent may be indirect, for example, public records showing that A. B. was in possession of the maliki interest may or may not be sufficient in any particular case. So far as regards the five tenancies now before their Lordships, it is difficult to impugn the accuracy of the view taken by the learned Subordinate Judge that the evidence given is neither satisfactory nor sufficient to prove 12 years' adverse possession. In Bhagjogna's suit the only decrees proved have reference to a period prior to 1903. In Ramsarup's cases proof of adverse possession no longer matters but it may be noted that in suit 110, he proved one rent decree obtained in 1920 in respect of the years 1916-19. In suit 111 there seems to be no proof of any rent decrees. In

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suit 112 there were two rent decrees, one in 1911 and one in 1919. In suit 113 there was one rent decree in 1920. Ramsarup's case is but slightly strengthened by khatiaunis or khasras. No doubt in the circumstances of the present case (referred to in the passage which their Lordships have just quoted from the judgment of Ross, J.) the mere fact that many years after the sale the Gangbarar maliks or persons deriving title from them are obtaining rent for the land is in itself very significant. Even in a locality exposed to diluvion by the action of the river this circumstance alone might be given considerable weight. But without sufficient proof to cover the intervening years it was most reasonably held by the learned Subordinate Judge to be insufficient. The circumstance that the Maharaja was not in possession or in receipt of rent is, it need hardly be said, insufficient under Art. 144 to warrant a finding of adverse possession on behalf of the respondents or their predecessors in title. Their Lordships are of opinion that on the materials produced it cannot be contended that the learned Subordinate Judge was obliged in law to find that the possession of the principal respondents had "all the qualities of adequacy, continuity and exclusiveness" (*per* Lord Shaw in *Krishnan* v. *Peringati*[1]) necessary to displace the title of the Maharaja, and they think that no reason in law exists why his finding of fact in this respect should not be final.

Their Lordships will humbly advise His Majesty that the appeal shonld be allowed in respect of Bahuria Musammat Bhagjogna's suit (suit No. 106), that the decree of the High Court therein be set aside and the decree of the Subordinate Judge restored: that in respect of the other suits this appeal should be dismissed. The appellant will get from Musammat Bhagjogna his costs of the appeal to the High Court in suit No. 106. The appellant will pay to the respondents who appeared three-fifths of their costs of this consolidated appeal.

Solicitors for Appellant: *Watkins & Hunter.*

Solicitors for Respondents: *Douglas Grant & Dold.*

R.C.C. —— *Appeal partly allowed.*

1. (1921) 41 M.L.J. 650: L.R. 48 I.A. 395; I.L.R. 44 M. 883 (P.C.).

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD RUSSELL OF KILLOWEN, LORD MACMILLAN AND SIR LANCELOT SANDERSON.

The Bharat Dharma Syndicate, Limited .. *Appellants**

v.

Harish Chandra .. *Respondent.*

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Companies Act (VII of 1913), S. 162—Application for winding up of company—Allegation that it was unable to pay debts—Charges of fraud included in affidavit subsequently filed—High Court ordering winding up—Interference by Privy Council—Charges of fraud—Need for specific details.

The respondent, who was the holder of an ordinary share in the appellant company, applied for winding up of the said company on the ground that it was unable to pay its debts. The petition contained certain particulars relating to the plea that the company was unable to pay its debts. In an affidavit filed by the company the allegations contained in the petition were denied. The respondent in reply filed an affidavit wherein he made serious charges of fraud against the person who controlled the affairs of the company. The High Court held that that the company should be wound up on two grounds that it was insolvent, and that it was just and equitable that it should be wound up owing to its fraudulent flotation and its fraudulent career. The appellant contended before the Privy Council that the plea of fraud ought not to have been gone into by the High Court, as it was not alleged in the petition.

Held, that the order for winding up of the company was justified both in fact and in law, and the whole question having been fought out in the High Court the objection that fraud was not alleged in the petition could not be upheld at that stage.

Where a litigant prefers charges of fraud he should be compelled to place on record precise and specific details of those charges. Otherwise it would result in considerable difficulty both to persons charged with fraud or other improper conduct and to the tribunals which are called upon to decide those issues.

Decision of the Allahabad High Court affirmed.

Appeal from a judgment and decree of the High Court of Allahabad (Thom and Iqbal Ahmad, JJ.) dated 29th April, 1935.

The respondent who was the holder of a single ordinary share in the appellant Syndicate presented a petition to the High Court for winding up of the company under S. 162 of the Indian Companies Act, 1913. The High Court in ordering the winding up of the Syndicate observed as follows:

"We find that the Bharat Dharma Syndicate, Limited, is insolvent and unable to pay its debts. We find that the promoters of the Syndicate were guilty of fraud in its flotation. We find that throughout its existence those

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*P.C. Appeal No. 87 of 1936. 22nd February, 1937.
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who controlled the policy of the Syndicate have been guilty of fraud, that they have falsified the books and balance sheets of the company and have deceived the shareholders, creditors and the general public. We find that the approval of the High Court to the reconstruction scheme in 1929 was obtained by fraud. We find, further, that in the opposition to the present application those in charge of the Syndicate's affairs have made false and fraudulent representations. In these circumstances it is the duty of the Court to order the Syndicate to be wound up."

Lionel Cohen, K.C. and *J. M. Parikh* for Appellants.

Sir Herbert Cunliffe, K.C., Pullan and *Mrs. M. J. Clark* for Respondent.

22nd February, 1937. Their Lordships' judgment was delivered by

Lord Russell of Killowen.

LORD RUSSELL OF KILLOWEN.—This is an appeal from an order of the High Court of Allahabad, by which it was ordered that the appellant company, the Bharat Dharma Syndicate, Limited, be wound up. The decree was made on the petition of the respondent, who when he presented the petition was the holder of one ordinary share of Rs. 25 upon which Rs. 12 had been paid up. He deposited the balance of Rs. 13 in Court during the proceedings.

The petition was heard by two Judges, Thom, J., and Iqbal Ahmad, J. A long and elaborate reserved judgment was delivered, which dealt in great detail with the history of the company from its formation down to the time when the petition was presented, and with the evidence and credibility of the witnesses in the case. The Court came to the conclusion that the company ought to be wound up on two grounds, namely —(i) that it was insolvent and (ii) that it was just and equitable that it should be wound up, owing (to put it shortly) to its fraudulent flotation and its fraudulent career, and to the consequent advisability (in the interest of the public and all concerned) of bringing its undesirable life to an end.

Their Lordships have had the great advantage of a full argument by Counsel for the appellants, in the course of which they made a close examination of the relevant facts, documents and evidence. Nothing could have been more complete. It was contended that no order for winding up on the ground of insolvency should have been made on the evidence, and in no event at the instance of this petitioner; and further that no order should have been made on the "just and equitable" ground, because no charge of fraud had been made in the

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petition, and no fraud had been established by the evidence in the case.

In regard to the first contention, their Lordships feel no doubt that this company is, and for the greater part of its existence has been, insolvent. Whether an order for winding up on this ground should have been made at the instance of this petitioner, is of small importance in view of the fact that in their Lordships' opinion, no case has been made out by the appellants which would justify them in interfering with the decision of the High Court.

The objection that fraud was not alleged in the petition cannot prevail at this stage. The allegations were made in the affidavit evidence, and the whole matter was clearly fought in the High Court on those lines; and apparently without any objection being taken, which had it been taken would no doubt have led to the necessary amendments being made in the petition.

Upon the merits of the case however, their Lordships feel bound to state—(but without having heard counsel for the respondent on the subject)—that they are not prepared to accept as established by the evidence, all the findings of fraud embodied by the High Court in the last paragraph but three of the judgment. They think that it is only right to make this clear in view of the possibility of criminal proceedings which is indicated in the next succeeding paragraph of that judgment. Nevertheless, without pausing to consider in detail whether the unfavourable view taken by the learned Judges, of the doings of this company, and of the actions of Gyananand and others who controlled the company's affairs, was completely justified in all respects, their Lordships are satisfied that there was ample material upon which the Judges of the High Court might, in their discretion, reach the conclusion that this company should not be permitted to continue in existence, and that it was just and equitable that it should be wound up.

Their Lordships are not so well qualified, as were the Judges who heard many of the witnesses and observed their demeanour, to form a conclusion as to the effect of the evidence as a whole. They observe however that after all the evidence had been placed before the Court, counsel appearing for the company based his opposition to a winding up order

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(which, he admitted, must have been made had the company been an ordinary commercial concern) upon the ground of the exceptional and religious or national objects of this company. That plea was not advanced before the Board; but the fact that it was raised in the High Court, coupled with the admission which preceded it, throws a strong light on the effect which the whole evidence had produced.

Their Lordships are of opinion that the order for winding up this company was justified both in fact and in law, and that this appeal should fail. They will humbly advise His Majesty accordingly. The appellants will pay the costs of the appeal.

Before parting with this case their Lordships desire to call attention to the great difficulty which is occasioned both to persons charged with fraud or other improper conduct, and to the tribunals which are called upon to decide such issues, if the litigant who prefers the charges is not compelled to place on record precise and specific details of those charges. In the present case the petitioner ought not to have been allowed to proceed with his petition and seek to prove fraud, unless and until he had, upon such terms as the Court thought fit to impose, amended his petition by including therein full particulars of the allegations which he intended to prove. Such cases as the present will be much simplified if this practice is strictly observed and insisted upon by the Court, even if, as in the present case, no objection is taken on behalf of the parties who are interested in disproving the accusations.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondent: *Douglas Grant & Dold.*

R. C. C. *Appeal dismissed.*

B. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Kona Adinarayana .. *Appellant* (1st Defendant)*

v.

Dronavalli Venkata Subbayya and another .. *Respondents (Plaintiffs 1 and 2).*

Adinarayana *v.* Venkata Subbayya.

Contract of sale—Minor represented by manager of family—Sale of immovable property for paying off debts incurred for family purposes—

* S. A. No. 726 of 1935. 25th March, 1937.

Adinarayana
v.
Venkata
Subbayya.

Whether contract valid—Suit for specific performance whether lies against vendee.

A contract of sale of immovable properties was entered into between plaintiffs 1 to 3 and defendant. The contract was executed in favour of first defendant by the plaintiffs 1 and 2 and the third plaintiff who was a minor represented by the first plaintiff as brother and guardian. The plaintiffs were members of an undivided Hindu family of which plaintiff was admittedly the manager. The purpose of the sale recited in the deed was to discharge a debt alleged to be one by the family. The defendant had paid an advance of Rs. 25 in pursuance of the contract and had ever since continued in possession. The three plaintiffs instituted the suit after the third plaintiff attained majority for specific performance of the said contract and for recovery of the balance of purchase money with interest thereon. The defence was that the purpose recited in the document was untrue, the contract was not binding on the minor plaintiff, that there was want of mutuality and hence the contract was unenforceable. The lower appellate Court having decided that on the date of the contract it could not be enforced against the minor, that there had been lack of mutuality, the subsequent confirmation was immaterial and that the contract could not be therefore enforced.

Held, (1) that it would be wrong to dismiss a suit for specific performance on the ground that the contract lacks mutuality having been made by or on behalf of minors who were not competent to contract.

Contracts made not by the minors but by persons who have power to make contracts on behalf of joint family do not appear to come within the scope of the ruling of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri,* (1911) 21 M.L.J. 1156: L.R. 39 I.A. 1: I.L.R. 39 Cal. 232 (P.C.).

Hari Charan Kuar v. *Kaula Rai,* (1917) 2 Pat.L.J. 513: 40 I.C. 142 (F. B.), followed.

(2) The fact that it was expressly stated in the contract that the first plaintiff represented the third plaintiff could not take away the representative character of the first plaintiff.

Dhapo v. *Ram Chandra,* (1934) I.L.R. 57 All. 374 and *Gharib-ullah* v. *Khalak Singh,* (1903) L.R. 30 I.A. 165: I.L.R. 25 All. 407 (P.C.), relied on.

In this case the contract of sale must be deemed to have been entered into by the first plaintiff as the *karta* of the family with the concurrence of the adult male member, the second plaintiff.

(3) That it was open to the purchaser to repudiate the contract on discovering the defect. But if the purchaser omitted to repudiate the contract and the vendor, the *karta,* cured the defect by obtaining also the concurrence of the third plaintiff, and was able to convey the entire property, it was competent to the Court to decree specific performance.

Principle in *Hoggart* v. *Scott,* (1830) 1 Russ. & M. 293: 39 E.R. 113 and *Salisbury* v. *Hatcher,* (1842) 2 Y. & C. C. C. 54: 63 E.R. 24, applied.

Kosuri Ramaraju v. *Ivalury Ramalingam,* (1902) 12 M.L.J. 400: I.L.R. 26 Mad. 74 and *Srinivasa Reddy* v. *Sivarama Reddy,* (1908) I.L.R. 32 Mad. 320, seem to suggest that a contract such as this is capable of ratification by persons who are not parties to the contract of sale by a manager and it can be enforced by the purchaser against them after such ratification. If it could be enforced against them, it must also be capable of enforcement by them.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam in A. S. No. 27 of 1935, preferred

against the decree of the Court of the District Munsiff of Gudivada in O.S. No. 272 of 1933.

P. Somasundaram for Appellant.

P. Satyanarayana Rao for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit for specific performance of a contract of sale of immovable property. The contract is dated 4th August, 1930, and the property agreed to be sold thereunder was an extent of 75 cents by seri dry bapat wet land bearing Re-survey No. 276/3 with the paddy crop thereon in the village of Krishnapuram, Kistna District. The sale price was Rs. 1,500. The contract was executed in favour of the first defendant by the plaintiffs 1 and 2 and the 3rd plaintiff represented by the first plaintiff as elder brother and guardian as he was then a minor. The plaintiffs 1 to 3 are members of an undivided Hindu family of which the first plaintiff is admittedly the manager. The purpose recited in the contract of sale was to discharge a debt alleged to be due by the family. In pursuance of this contract an advance of Rs. 25 was paid by the first defendant and possession of the property was given over to him on the said date and ever since the first defendant has continued in possession. This suit has been instituted on the 4th August, 1933, by the three plaintiffs after the third plaintiff attained majority for specific performance of the said contract and for recovery of the balance of purchase money with interest thereon alleging that they were ever ready and willing to perform the contract. They have also impleaded defendants 2 to 4 along with the first defendant as they are the sons of the first defendant. The main defence was that the purpose recited in the document was untrue; the contract was not binding on the minor plaintiff; there was thus want of mutality and hence the contract was unenforceable. Two issues were raised in the case, namely:

"(1) Whether the suit contract is binding on the minor third plaintiff?
(2) Whether the contract is unenforceable for want of mutuality?"

It was found that the purpose recited in the document was not true; there was no legal necessity such as would justify the sale of the joint family property. The first Court nevertheless gave a decree in favour of the plaintiff on the ground that that question was immaterial as the third plaintiff also sued

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for specific performance. The learned Subordinate Judge on appeal was of the opinion that on the date of the contract it could not be enforced against the minor; there was a lack of mutuality; his subsequent affirmation was immaterial and the contract could not be enforced against him following the decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*[1]. He nevertheless gave a decree by directing specific performance in respect of two-third share in the plaint schedule property. Both parties have preferred appeals against this decision, the plaintiffs on the ground that specific performance prayed for by them should have been decreed and the defendants on the ground that the decree as given is unsustainable in view of the fact that what was decreed was not what was bargained for and the contract was an indivisible contract and could not be split up in the manner directed by the learned Subordinate Judge.

The question, therefore, is, is the principle of the decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*[1] applicable to this case? In the said case, a minor after attaining majority sued to enforce a contract of sale of immovable property entered into by the guardian during the minority. It was held he could not sue. Their Lordships of the Judicial Committee expressed themselves thus:

> "It is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached his majority cannot obtain a specific performance of the contract."

The want of mutality, it will be seen, is based on the personal incapacity of the plaintiff to enter into the contract at the time the contract was entered into, and subsequent affirmation by the minor after attaining majority was held immaterial. Can this ground be available at all with reference to contracts entered into by a joint family which may consist of minors as well as adults and the family as such is treated as one entity in its relations with the outside world? The family owns and possesses property and there is no minor's estate as such. The manager represents the family; he enters into contract on its behalf; the contract of sale entered into by him must be

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1. (1911) 21 M.L.J. 1156: L.R. 39 I.A. 1: I.L.R. 39 Cal. 232 (P.C.).

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deemed to be on behalf of every member of the family adult or minor. If the transaction is one for a purpose binding on the family, the minor's interest in the property is also bound and it is within the competence of the manager to bind so unlike the manager or a minor's estate or the guardian of a minor who is not competent to bind the minor's estate by such a contract even though it may be for his benefit. No question, therefore, of lack of mutuality arising from incapacity to contract arises at all. I agree with Chamier, C.J., who delivered the leading judgment of the Full Bench in *Hari Charan Kuar* v. *Kaula Rai*[1] when he says that contracts made not by the minors but by persons who have power to make contracts on behalf of a joint family do not appear to come within the scope of the ruling in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*[2] and it is wrong to dismiss a suit for specific performance on the ground that the contract lacks mutuality having been made by or on behalf of minors who are not competent to contract. The same view was taken by a Bench of the Allahabad High Court in *Dhapo* v. *Ram Chandra*[3].

It is contended by Mr. Somasundaram that the suit contract could not be said to have been entered into on behalf of the family as all the members of the family were not parties and the third plaintiff was separately represented by the first plaintiff. I do not agree with this contention. The property sought to be sold was admittedly joint family property. The purpose alleged was joint family purpose. The first plaintiff, as manager and as the elder brother of the family, represented the third plaintiff because he only could represent him. If the first plaintiff alone had executed the contract as manager, he must, in law, be deemed to have represented the second and third plaintiffs. The fact that it is expressly stated in the contract that the first plaintiff represented the third plaintiff cannot take away the representative character of the first plaintiff. (Vide *Dhapo* v. *Ram Chandra*[3].) The association of the second plaintiff in the contract was for the purpose of obtaining his concurrence therein. I may usefully refer in this connection to a decision of the Privy Council reported in

1. (1917) 2 Pat.L.J. 513: 40 I.C. 142 (F.B.).
2. (1911) 21 M.L.J. 1156: L.R. 39 I.A. 1: I.L.R. 39 Cal. 232 (P.C.).
3. (1934) I.L.R. 57 All. 374.

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Gharib-ullah v. *Khalak Singh*[1]. In that case there were three undivided brothers, Khalak Singh, Jangli Singh and Jai Singh. On the date of their father's death, Jangli Singh and Jai Singh were minors and their mother obtained a certificate of guardianship from the Court. For discharging debts due by the family after Jangli Singh attained majority, a mortgage was executed and the parties to the mortgage were Khalak Singh, Jangli Singh, for themselves and Jai Singh represented by his mother as guardian. In a suit to enforce the mortgage, the plea was that Jai Singh was admittedly a minor and member of a joint family; the mother could not be appointed guardian; her representation in the mortgage of the minor was not a valid representation and Khalak Singh did not represent him in fact and, therefore, the mortgage could not be enforced as against the minor. Their Lordships accepting the contention that the mother could not have been appointed guardian of the minor in respect of the joint family property, nevertheless, held that the mortgage must be deemed to have been made on behalf of the family and observed thus:

> "Their Lordships think that the mortgages under consideration were not mortgages by the guardian, assuming the mother to have been a guardian, but mortgages by the family, entered into by the *karta* of the family, with the concurrence of Jangli, the only other adult member of the family."

In this case, therefore, the contract of sale must be deemed to have been entered into by the first plaintiff as the *karta* of the family with the concurrence of the adult male member, the second plaintiff.

The next contention of Mr. Somasundaram is that in view of the finding of the learned Subordinate Judge that the attempted sale was not for the purpose binding on the family and therefore the minor's interest could not have been validly conveyed in pursuance of the said contract, no decree for specific performance can be passed on the basis of such a contract. There is no doubt that the legal effect of the said finding is that the first and second plaintiffs could not have conveyed the entirety of the property sought to be sold. I will assume that the contract is indivisible and the vendors, the first and second plaintiffs, could not have compelled the first defendant to take a conveyance of their shares subject to payment of compensation; but it would not have precluded the first defendant from insisting upon a conveyance of their shares, if

1. (1903) L.R. 30 I.A. 165: I.L.R. 25 All. 407 (P.C.).

he so desired, subject to payment of compensation. Under such circumstances, it is very doubtful if, on the basis of lack of mutuality, a decree for specific performance can be refused at all. However, it was open to the purchaser to repudiate the contract on discovering a defect such as this but before repudiation or on discovery of the defect, if the purchaser omits to repudiate the contract and the vendor, the *karta*, cures the defect by obtaining also the concurrence of the third plaintiff and is able to convey the entire property, it is competent to the Court to decree specific performance. In my opinion the principle of the decision in *Hoggart* v. *Scott*[1] would apply.

The said principle is this:

"The plaintiff in a bill for the specific performance of a contract is entitled to a decree, if, at the hearing, he can show a good title, although he had not such title at the time of the contract; but the defendant might, if he had thought fit, have retired from the contract, as soon as the want of title was discovered, and was not bound to wait till the plaintiff could acquire a good title."

A similar principle was applied in the case of *Salisbury* v. *Hatcher*[2] where specific performance of a contract for sale of an estate in fee simple was decreed in favour of a vendor who at the time of the contract was tenant for life only; the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor, and the vendor being able by means of the consent of the parties interested in remainder to make a good *prima facie* title to the fee simple at the hearing. In this case, though the first defendant according to him discovered within six months after the date of the contract that the recital in the contract of sale that the property was sold for the purpose of discharging a debt in favour of Buchayya was not true, still he continued in possession of the lands and did not repudiate the contract and surrender possession thereof. The right to repudiate must be deemed to have been waived by the first defendant. It is after all an equitable right and cannot be enforced in favour of a person who has no equity in his favour. There is nothing in Hindu Law or in the Specific Relief Act which prevents the application of the principle of the said cases to the present case. The cases in *Kosuri Ramaraju* v. *Ivalury Ramalingam*[3]

1. (1830) 1 Russ. & M. 293: 39 E.R. 113.
2. (1842) 2 Y. & C. C. C. 54: 63 E.R. 24.
3. (1902) 12 M.L.J. 400: I.L.R. 26 Mad. 74.

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and *Srinivasa Reddy* v. *Sivarama Reddy*[1] seem to suggest that a contract such as this is capable of ratification by persons who are not parties to the contract of sale by a manager and it can be enforced by the purchaser against them after such ratification. If it could be enforced against them, it must also be capable of enforcement by them. Further, as on the date of suit the plaintiffs in this case are able and willing to give a valid title to and convey the property agreed to be conveyed under Ex. I, they are entitled to a decree for specific performance as prayed for. I therefore reverse the decree of the learned Subordinate Judge, allow the memorandum of objections with costs and restore the decree of the District Munsiff. As a result of this judgment, the second appeal fails and is dismissed, but I make no order as to costs in the second appeal.

Leave to appeal granted.

K. C. *Appeal dismissed.*

Memorandum of objections allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

R. Krishnaswamy Aiyangar .. *Appellant* (1st Defendant)*

v.

The Sri Kallalagar Devasthanam, Madura, through K. N. Radhakrishna Aiyar (new trustee in place of the former trustee) *vide* order dated 18th December, 1933, on C. M. P. No. 6404 of 1933 .. *Respondent (Plaintiff).*

Krishnaswamy Aiyangar v. Sri Kallalagar Devasthanam, Madura.

Hindu Religious Endowment—Temple—Temple committee—Direction to trustee to perform a festival at a particular cost—Trustee performing at a higher cost—Cost such as the temple could afford—Trustee bringing the fact of excess expense to notice of committee—Committee keeping quiet—Ratification—Trustee, if guilty of a breach of trust.

Where a temple committee having jurisdiction over the suit temple wanted the trustee to celebrate an important festival in the temple at a cost of only Rs. 1,000 but immediately the trustee replied stating that the allotment was small but yet began the festival and spent a little over Rs. 4,000 and there was no reply to the letter of the trustee nor any

1. (1908) I.L.R. 32 Mad. 320.

* S. A. No. 337 of 1933. 30th March, 1937.

complaint by the committee for nearly three years after, and it was found that "the temple is rich and is in a position to spend Rs. 4,000 and even more for the jyeshtabishekam" (the festival in question).

Held, that the trustee was not guilty of breach of trust or negligence and was not bound to return to the temple the excess over Rs. 1,000 spent by him. It is not the law that even though the temple has enough money and could afford to celebrate a festival magnificently, nevertheless the trustee is bound to celebrate it as economically as possible. Expenditure on festivals in temples by the trustees should not be wholly guided by considerations similar to expenditure by guardian for minors, namely, necessaries or benefit. So long as the temple endowment can stand the strain, the celebration of a festival on a grand scale cannot be regarded as being unreasonable or extravagant and the conduct of such a festival in such a manner by the trustee cannot be regarded as a breach of trust.

Further that even assuming the trustee is only an agent of the committee, yet inasmuch as when the trustee brought the expense to their notice, they kept quiet and took no action against him, they must be deemed to have ratified the act of the trustee.

Appeal against the decree of the District Court of Madura, in A. S. No. 125 of 1930 preferred against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 120 of 1928.

K. Rajah Aiyar for Appellant.

B. Sitarama Rao, P. Marthandam Pillai and *C. Rangaswami Aiyangar* for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal from the decree of the District Judge of Madura dated 18th October, 1932, affirming on appeal the decree of the principal Subordinate Judge of Madura dated 28th February, 1930, in O. S. No. 120 of 1928 which was a suit for recovery of Rs. 4,625 from the defendants, three in number. The principal allegations were that the first defendant who was the trustee of the plaint mentioned Devasthanam, Sri Kallalagar Devasthanam, from 1919 to April, 1926, had been grossly negligent as regards certain items set forth in Sch. II to the plaint, and that his negligence had caused loss to the Devasthanam which he was bound to make good. The other two defendants were impleaded on the ground that they had executed a security bond binding themselves to make good to the Devasthanam any loss that might be caused by the first defendant's breach of duty or negligence, etc The suit was dismissed by the trial Court as against defendants 2 and 3 and the only item in respect of which negligence was found to be proved by the trial Court was in respect of the special festival celebrated in June, 1924, at the

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temple, known as the *thailaprithishtai* and *jyeshtabishekam*. As regards the other items charged, the trial Court found that the first defendant was not guilty of any negligence. As regards the money spent for this special festival by the first defendant, the trial Court was of opinion that though the temple was a rich one and was in a position to spend Rs. 4,000 and even more for the *jyeshtabishekam*, the first defendant was not justified in spending more than the Rs. 1,000 that was sanctioned by the temple committee. In other words, his finding was that, though the temple could very well afford the amount actually spent on the festival, nevertheless the first defendant was only a subordinate of the committee and had exceeded the allotment of Rs. 1,000 fixed by the committee, and he was therefore liable to pay back the excess spent by him, namely, Rs. 3,633 and passed a decree accordingly. On appeal this decree was confirmed by the District Judge who was of opinion that because the first defendant ignored the limit of expenditure imposed by the temple committee, he did so at his peril and that he cannot shelter himself behind an allegation that the allotment was unreasonable. The first defendant is the appellant in this second appeal.

A great deal has been said in the course of the argument before me as to the powers of the temple committee to issue directions to the temple trustee or manager. Reference has been made to the decisions in *Seshadri Aiyangar* v. *Nataraja Aiyar*[1], *Sitharama Chetty* v. *Sir S. Subramania Aiyar*[2] and also to *Subba Naidu* v. *Gopalaswamy Naidu*[3]. There is no doubt that the temple committee have the power of general superintendence over endowments for the purpose of seeing that the endowments are appropriated for the purpose for which they were granted. They have also the power of appointing trustees or managers and of calling for accounts from them and scrutinise the accounts. It may be they also possess the power of calling for budgets every year and of passing them with or without modification. No authority has been brought to my notice in which it has been held that the mere exceeding of the budget allotments by the trustee or manager is itself a sufficient ground for compelling the trustee or

1. (1898) I.L.R. 21 Mad. 179.
2. (1915) 30 M.L.J. 29: I.L.R. 39 Mad. 700.
3. (1905) 15 M.L.J. 185.

manager to make good the excess amount spent by him though for a purpose binding on the temple. Exceeding of budget allotments is not rare even in the best regulated establishments, and it is difficult to believe that cases of such exceeding of budget allotments would have been very rare in the administration of temples by trustees or managers. It is therefore significant that there has been no reported case at all in which any one has sought to recover from a trustee or ex-trustee or manager the amount spent by him in excess of the amount allotted in the budget. It would appear as if no temple committee or no subsequent trustee ever conceived the idea of making any temple manager or trustee liable to make good the amount spent by him in excess of the budget allotments. In this particular case the exceeding of the budget allotment was, if I may say so, quite justifiable in the circumstances; it was the committee itself who wanted the trustee or manager to celebrate the festival which is a special one held only very occasionally, once in 20 years or so. Immediately on receipt of this order by the trustee, the latter represented to the committee that it was impossible to celebrate the festival at a cost of Rs. 1,000 which was the amount sanctioned by the committee. To this letter, the committee made no reply, and the festival was conducted on a befitting scale by the appellant in the presence of and with the active assistance of one prominent member of the temple committee, one Mr. Alagappa Chettiar, who unfortunately died before the evidence in the suit was recorded. Another member of the committee appears also to have been present at the festival. The findings of the Courts below are to the effect that the money was actually spent for the festival; in other words, there is nothing to show that any portion of the amount was misappropriated. The temple is very ancient and important and enjoys considerable repute. The annual income is something over Rs. 60,000 and the festival in question was a special one, the object of which was to restore the lost or diminished lustre of the idol. This process appears to involve elaborate preparation of costly oils and it is impossible to say that the festival could have been fittingly performed within the amount sanctioned by the committee. Full accounts were submitted to the committee by the first defendant and practically no objections was taken to the accounts, the only objection taken being to a very small item of cart hire and the supply of a small quantity

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of Madras snuff and tobacco to the establishment. As the learned District Judge observes in his judgment the committee was to some extent to blame for what happened because they passed no orders on the appellant's report to the effect that the festival could not be celebrated at a cost of anything like Rs. 1,000 and also because they never took any steps either to repudiate the excess expenditure actually incurred or to regularise it after the accounts were received by them. The accounts were received by the committee sometime in November, 1925, and the present suit was instituted only in October, 1928. During all this period, there was never any complaint about the exceeding of the budget allotment in respect of this festival. The learned District Judge while saying that it is not necessary to go into details has nevertheless permitted himself to observe that:

"The huge sums spent on fire works, public feeding and such matters could easily have been reduced to proportions more suitable to the financial resources of the temple."

As a matter of fact the details show that the amount spent on fire works is only Rs. 69 which certainly cannot be regarded as a huge sum. Public feeding which cost about Rs. 900 was a necessity as the temple is situated in a place where admittedly there are no hotels or eating houses and the worshippers who had come to attend the festival would have had to starve if the trustee had not made arrangements for feeding them. The financial resources of the temple, as stated above, are more than sufficient to stand an expenditure of the amount incurred in this connection. As the learned trial Judge remarks:

"The temple is rich and is in a position to spend Rs. 4,000 and even more for the *jyeshtabishekam*."

I am unable to appreciate the contention that even though the temple had enough money and could afford to celebrate the festival magnificently, nevertheless the trustee was bound to celebrate it as economically as possible. I do not think expenditure on festivals in temples by the trustees should be wholly guided by considerations similar to expenditure by guardians for the minors' necessaries or benefit. Festivals and other ceremonies conducted in honour of God cannot be regarded as being similar to necessaries in the case of minors; so long as the temple endowment can stand the strain, the celebration of a festival on a grand scale cannot in my opinion be regarded

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as being unreasonable or extravagant, and the conduct of such a festival in such a manner by a trustee or manager should not in my opinion be regarded as a breach of trust or negligence. He has only to do his duty according to the best of his judgment and to the satisfaction of the worshippers whose contributions add to the income of the temple. There has been in this case no misappropriation of any kind and the temple is certainly rich enough to afford to spend a sum of Rs. 4,600 on a special festival and there is in my judgment no justification for the view that the temple trustee or manager is liable to make good out of his pocket everything spent by him over and above the amount allotted by the committee. Such a general proposition is in my opinion not in accordance with law. Even otherwise in this particular case, the conduct of the committee has been such that the excess expenditure must be deemed to have been ratified by the committee. Even assuming that the position of the trustee or manager is only that of an agent bound to obey every direction of his principal, that is, the committee, nevertheless when he brings to the notice of the principal the fact that he had exceeded his authority by spending more than what was sanctioned and the principal acquiesces in it and takes no action whatever against him, his act must be deemed to have been ratified by the principal. In this connection reference may be made to *Ramasami Chetty* v. *Karuppan Chetty*[1]. The learned Judge therefore erred in law in coming to the conclusion that, though the committee was to some extent to blame for what happened because it passed no orders on the appellant's letter Ex. G-4 and there should have been prompt action to regularise or repudiate the excess expenditure, the appellant was liable all the same to make good the excess to the succeeding trustee. He did not consider the question whether in these circumstances there was not a ratification of the appellant's act by the committee. The appeal must therefore be allowed and the decree passed against the appellant set aside with costs in this Court and in the Courts below to be paid out of the temple funds.

Leave to appeal is refused.

S. V. V. —— *Appeal allowed.*

1. (1915) 29 M.L.J. 551.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE MOCKETT.

Peer Ammal and another .. *Appellants* (Defendants Nos. 1 and 4)*

v.

Nalluswami Pillai and others .. *Respondents (Plaintiff and Defendants 2, 3 and 6 to 10).*

Peer Ammal *v.* Nalluswami Pillai.

Civil Procedure Code (V of 1908)—Suit on mortgage—Defendant represented by two vakils—Defendant present in person—Senior absent when case called on—Junior declining to go on with the case—Plaintiff's witnesses examined—Suit decreed ex parte—*Application under O. 9, r. 13, Civil Procedure Code—Dismissal of—Appeal against decree—Appellate Court if precluded from going into the propriety of order refusing adjournment—Scope of appeal—Mortgage suit by some only interested in mortgage money—How far maintainable.*

After some adjournments, the suit on a mortgage came on for hearing on the 8th August, 1928. The contesting defendants, a Mahomedan lady and her minor son, had engaged two counsel, a senior and a junior. When the case was called on first between 11 and 12 noon that day, it was represented to the Court by the junior vakil that the senior had gone to another Court because he had been led to think that the sessions case in this Court would take some time. That case did not, for some reason, take as long as it was expected. At 1 P.M. the case was again called but the Court could not adjourn the case further. The contesting defendant (lady) was in Court at the time and she was acting for herself and her minor son as his guardian. The junior vakil was not prepared to take the responsibility of cross-examining the plaintiff's witnesses or of leading evidence on behalf of his clients. The case was taken up, evidence on the plaintiff's side was recorded without any cross-examination and the suit was decreed. The next day, an application was filed under O. 9, r. 13 to set aside the *ex parte* decree and it was ordered on terms. But that order was set aside in revision by the High Court, holding that there was not sufficient cause for non-appearance. The defendant filed also an appeal against the decree.

Held, in the appeal against the decree, that though on general principles some finality should attach to the order passed in the proceedings under O. 9, r. 13, yet such finality is limited to matters within the scope of O. 9, r. 13 and the Court is not, in appeal against the decree, precluded from considering the merits of the question whether in the circumstances of the case, an adjournment should have been granted or not. The petition under O. 9, r. 13 was here wrongly put in and therefore he is not precluded from agitating this point in this appeal. Further in the appeal the point is not whether there was sufficient cause for non-appearance but whether or not in the interests of justice, having regard to the facts, it would not have been better for the Court to have adjourned the case.

Mullick v. *Ganga Gope*, A.I.R. 1925 Pat. 534, referred to.

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* Appeal No. 532 of 1930. 5th May, 1937.

Peer Ammal *v.* Nallu-swami Pillai.

Per *Mockett, J.*—The position of the Judges sitting in appeal against the decree passed *ex parte* to canvass the correctness or refusal to adjourn is very similar to that of a Judge sitting in revision considering an application under O. 9, r. 13, Civil Procedure Code.

The question how far a suit for recovery of their portion of the mortgage money by some of the persons interested in part of the mortgage money is maintainable in the absence of the other mortgagees left open as the point was not raised in the trial Court and in this case the mortgage had become split up by one of the mortgagors becoming interested in the mortgage right and it was not clear that the plaint was for only the plaintiff's share of the mortgage money.

Sunitabala Debi v. *Dhara Sundari Debi Chowdhurani*, (1919) 37 M.L.J. 483: L.R. 46 I.A. 272: I.L.R. 47 Cal. 175 (P.C.) and *Seth Bansiram Jashamal* v. *Gunnia Naga Aiyar*, (1930) 59 M.L.J. 928, discussed.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Madura, in O. S. No. 128 of 1926.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellants.

K. S. Jayarama Aiyar and *K. Swaminatha Aiyar* for Respondents.

The Court made the following

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ORDER. *Varadachariar, J.*—This appeal arises out of a suit for the sale on foot of a mortgage deed, Ex. A, executed in 1911 by one Peer Muhammad in favour of Alla Pichai Rowther who was the mortgagor's brother-in-law as well as his son-in-law. The mortgagee died in 1913 leaving a number of heirs some of whom are also interested in the equity of redemption by reason of their relationship to Peer Muhammad. It is clear from the plaint itself that no payment either towards any portion of the principal or towards interest was made in respect of this mortgage between 1911 and the date of the suit. In August, 1926, Allapichai Rowther's widow, that is, the seventh defendant and two of her daughters assigned their interest in the mortgage bond to the plaintiff under Ex. B, and this suit was filed in September, 1926. Besides the persons who are also the heirs of the mortgagor the only other co-heir to the mortgagee's estate, so far as we have been able together, is one Nagur Kanni Rowther who was impleaded as the ninth defendant in the case.

In view of the arguments urged before us, on behalf of the appellants, as to the frame of the suit, it is necessary to mention that the assignors were entitled only to 19/24th share in the mortgagee's estate and that the assignee therefore

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became entitled only to that share of the mortgage money. It also appears that the assignors had somehow become interested in a portion of the hypotheca and it is accordingly stated in the deed of assignment that the assignee should proceed only against the rest of the hypotheca. In these circumstances the plaint sets out the fact that the plaintiff was entitled only to a 19/24th share in the mortgage amount and in paragraph 14 of the plaint the plaintiff works out the amount due under the mortgage deed at Rs. 7,644 and stated that 19/24th share therein is Rs. 6,051-8-0 and after remitting therefrom on his own choice Rs. 551-8-0 the plaintiff limits his claim to Rs. 5,500 which he takes as the figure for the purposes of court-fees and jurisdiction.

A written statement was filed on behalf of defendants 1, 5 and 4 the widows and the son of the mortgagor. Neither in this written statement nor at the stage when the issues were framed in the case was any objection taken to the frame of the suit. Nor does it appear that any such objection was urged at any time before judgment was given in the lower Court. The issues framed in the case related to three pleas, (1) that the plaint bond was not true and supported by consideration; (2) that the assignment relied on by the plaintiff was not true and supported by consideration; and (3) that the suit was barred by limitation. I may say at this stage that it is unnecessary for the purpose of this appeal to notice any further the pleas involved in issues 2 and 3 because there is no *prima facie* basis for the second issue, nor is there any substance in the third issue.

In the appeal, however, objection has been taken to the frame of the suit. The learned Counsel for the appellant laid some stress upon the fact that the plaint claim relied against some of the mortgaged properties, but realising that the omission to claim relief as against the other properties—whatever other consequences it may involve—was not fatal to the maintainability of the suit, he tried to press it into service as part of his objection based on the proviso to S. 67 of the Transfer of Property Act, especially when taken along with the fact that the plaintiff is limiting his claim to 19/24th share of the mortgage amount. S. 67 of the Transfer of Property Act no doubt provides that a mortgagee or co-mortgagee cannot claim to recover a fraction of the mortgage amount from

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a proportionate fraction of the mortgaged property. But in the present case, the omission of some of the mortgaged properties from the suit has, in view of the provisions in the assignment deed, nothing to do with the limitation of the plaintiff's claim to a fraction of the mortgage amount. There is accordingly no force in the objection about the omission to include some of the hypotheca.

The objection that the plaint should have in some manner comprised the whole claim under the mortgage might have had some force and might have required more serious notice if the objection had been raised in time. It cannot be said that the objection is purely one of law arising on the pleadings, because admittedly one of the mortgagor's heirs, that is, the first defendant is also entitled to a share in the mortgage money. The other co-heir who is said to be entitled to a 10/72nd share in the mortgage amount is the ninth defendant. He has not filed any written statement and what exactly his position is either in relation to the first defendant or in relation to the plaintiff we have no means of knowing. It is possible that these two heirs of the mortgagee did not wish to enforce their claim under the mortgage or their claim has been otherwise satisfied; and in the latter alternative the plaintiff will certainly be entitled to limit his claim to the portion which is due to himself. In this view, I do not think that this Court will be justified in allowing this objection to the frame of the suit to be raised for the first time at this stage.

But as this question as to the frame of the suit has been argued at some length before us, I think it right to make a few observations on one or two aspects of the matter. On behalf of the appellant, Mr. Bhashyam Aiyangar asked us to read the decision of the Privy Council in *Sunitabala Debi* v. *Dhara Sundari Debi Chowdhurani*[1] as laying down a rule in addition to that contained in the proviso to S. 67 of the Transfer of Property Act. The suit as originally framed in that case undoubtedly contravened that prohibition because the plaint in that suit claimed a sale of a half share in the mortgaged property in respect of the plaintiff's half share of the mortgage amount. That defect was remedied by the directions given by the High Court for the amendment of the plaint to the following effect:

"If in the opinion of the Court the plaintiff is held to be not entitled to a

1. (1919) 37 M.L.J. 433: L.R. 46 I.A. 272: I.L.R. 47 Cal. 175 (P.C.).

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decree on the footing of a mortgage for the principal sum of Rs. 80,000 then a usual mortgage decree may be passed in favour of the plaintiff and the defendant No. 3 for the amount found due up to the period of grace to be fixed by the Court upon the basis of the entire mortgage-money, that is Rs. 1,60,000." (*See* the report in *Sunitabala Debi* v. *Dhara Sundari Debi Chowdhurani*[1].)

Their Lordships of the Privy Council construed the mortgage as being a single mortgage for Rs. 1,60,000 in favour of the plaintiff and the third defendant as tenants-in-common and repelled the contention that the document evidenced two mortgages in favour of two mortgagees for Rs. 80,000 each. Even on this view, the objection under S. 67 of the Transfer of Property Act would seem to have been obviated by the amendment directed by the High Court. When the matter was before the Judicial Committee, the observations of their Lordships seem to proceed on the lines laid down by the Court of Appeal in England in *Luke* v. *South Kensington Hotel Company*[2], namely, that not merely should all the mortgagees be before the Court whether as plaintiff or as defendants but that the suit should be so constituted as to make it possible for the Court eventually to give a decree in respect of the whole mortgage amount and not merely in respect of the plaintiff's share. If this was all that their Lordships intended to lay down, the amendment directed by the High Court would seem to give effect to that principle. But their Lordships observe that the amendment directed by the High Court "is not properly worded"; the judgment however gives no clear indication as to what in their Lordships' opinion was the defect.

This decision was considered by Ramesam, J., in the judgment reported in *Seth Bansiram Jashamal* v. *Gunnia Naga Aiyar*[3]. The learned Judge was discussing the question from the point of view of the court-fee which a co-mortgagee should in similar circumstances be called upon to pay when suing on the mortgage, limiting his claim to his share of the mortgage amount. The learned Judge would seem to think that the observations of the Judicial Committee would be complied with if the co-mortgagee who did not join as the plaintiff was impleaded as the defendant and the relief was not restricted to a share of the mortgaged property. In his

1. (1919) 37 M.L.J. 483: L.R. 46 I.A. 272: I.L.R. 47 Cal. 175 (P.C.).
2. (1879) 11 Ch. D. 121.
3. (1930) 59 M.L.J. 928.

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opinion it was necessary that the plaintiff should ask for a decree for the whole amount due under the mortgage or pay court-fee thereon. If it were necessary to decide the question, I should have felt some difficulty in agreeing with some of the reasons given in support of this view. The hardship involved in calling upon the plaintiff to pay court-fee on the full amount does not seem to be a proper reason to be relied upon in determining the proper frame of the suit. But for S. 3 of the Suits Valuation Act, it might perhaps be possible even to obviate this hardship by a particular construction of S. 7, cl. (1) of the Court-Fees Act, holding that the words "according to the amount claimed" in that clause may refer to the amount claimed by the plaintiff for himself. An illustration may help to make my meaning clear. Take the case where a puisne mortgagee includes a prior mortgagee as a party defendant in the action and prays that the property may be sold free of mortgages and that out of the proceeds the prior mortgagee may be paid in the first instance and the balance applied in discharge of the plaintiff's claim. O. 34 of the Code of Civil Procedure and the decree forms appended to the Code undoubtedly contemplates such a case. There is no reason for holding that in such a case, the plaintiff should value his suit by adding even the amount payable on the prior mortgage or pay court-fee thereon. If this principle could be extended, by way of analogy, to the case of a co-mortgagee, it may be possible to relieve him from the hardship of paying court-fee on the whole amount. If, on the other hand, the question is raised as one relating to the jurisdictions of the Court instead of a question of court-fee, the difficulty of accepting some of Ramesam J.'s observations will become apparent. Suppose the plaintiff's share in the mortgage amount was within the limits of the Court's jurisdiction but the whole amount due under the mortgage was in excess of its jurisdiction, as might well happen in this country. Ramesam, J., certainly contemplates that the decree passed in the suit may provide for the realisation of the whole of the mortgage amount by sale of the property and not merely of the plaintiff's share. What is to be regarded as the value of the suit for purposes of jurisdiction? There is an obvious distinction between the case of a co-mortgagee and that of a prior mortgagee above referred to by way of illustration: a

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puisne mortgagee suing as plaintiff may well bring the hypotheca to sale *subject* to the prior mortgage, but one co-mortgagee cannot sell the hypotheca subject to the other co-mortgagee's right. Further, if it becomes necessary to sell the whole or anything in excess of a proportionate part of the hypotheca to realise even the amount due to the plaintiff co-mortgagee, it will be neither fair nor consistent with the policy of the law to allow the plaintiff to appropriate the proceeds wholly in satisfaction of his claim. Justice can be done between all the parties concerned only by providing in the decree for the distribution of the sale proceeds amongst the co-mortgagees. It accordingly seems to me more reasonable to regard the mortgage as a *single* cause of action at any rate for purposes of jurisdiction and in such a case under S. 8 of the Suits Valuation Act, the valuation for purposes of court-fee cannot be different. Ramesam, J., suggests that as regards the defendant co-mortgagee's share, the Court may be able to collect the court-fees later on before distributing the monies to him. With great respect, I venture to doubt if there is anything in the Court-Fees Act authorising the Court to do so. It is not within the scope of S. 11 of the Court-Fees Act. (Cf. *Ramaswami Aiyar* v. *Rangaswami Aiyar*[1].) The learned Judge refers to the analogy of partition suits where even the defendants may claim a share on payment of court-fee. In *Venkatasubbamma* v. *Ramanathayya*[2], the same learned Judge, as a member of a bench, held that a defendant in a partition suit cannot be called upon to pay court-fee in respect of his share.

Reference was made by Mr. Jayarama Aiyar (the learned Counsel for the respondent) in this connection to the decision in *Gopalu Pillai* v. *Kothandarama Aiyar*[3] where the learned Judges drew a distinction between a claim by one of two joint promisees and a claim by one of two co-heirs of a single promisee. With great respect I am not, as at present advised, satisfied with that distinction. It is possible, as contended by Mr. Jayarama Aiyar that the frame of the suit in the present case may be justified on the ground that the mortgage had become split up by the admitted fact that the first defendant had become interested in the mortgage right as well as in the equity

1. (1931) 61 M.L.J. 933: I.L.R. 55 Mad. 26.
2. (1932) 63 M.L.J. 845: I.L.R. 55 Mad. 975.
3. (1934) 67 M.L.J. 843: I.L.R. 57 Mad. 1082.

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of redemption. But this question was not argued at great length before us and I do not therefore deal with it further.

I may also add that even according to the decision of their Lordships in *Sunitabala Debi* v. *Dhara Sundari Debi Chowdhurani*[1] the objections to the frame of the suit is by no means fatal and it might well be met by directing an amendment of the plaint. It is not by any means clear from the plaint that the plaintiff has framed the suit only for a share of the mortgage money. It is clear from the remission of Rs. 551 even out of the 19/24th share that he thought that he could not realise more than Rs. 5,500 out of the available hypotheca. This is another reason which has induced me to overrule the appellant's contention as one raised at a late stage. If, as was apparent, the only object of the appellants in raising this objection was to get an opportunity of having the case tried again before the lower Court, it is very doubtful whether I should have acceded to that request but for the fact that for other reasons I have decided to give the appellants such an opportunity.

This takes me on to the question which has been argued on the merits and which I am free to confess has given me great difficulty in making up my mind. The first issue, as I have already stated, related to the question whether the suit bond was only nominal or was supported by consideration. In an attempt to persuade us not to show any indulgence to the appellants at this stage, Mr. Jayarama Aiyar laid stress on the fact that this is a familiar plea in Indian Courts and contended that we will be encouraging a frivolous plea by allowing it to be seriously pressed so many years after the transaction. I may be embarrassing the Court in deciding the case on the merits, by referring at great length to the circumstances suggesting that the plea may not after all be frivolous. I therefore content myself with saying that the circumstances of the case do not justify the contention that the plea must necessarily be frivolous. As to the argument based upon the lapse of time, I would only point out that this is not by any means an argument against the defendants; on the other hand, they themselves rely on the circumstance that notwithstanding the fact that no payment had been made towards interest or principal, no action was taken to enforce the mortgage between

1. (1919) 37 M.L.J. 483: L.R. 46 I.A. 272: I.L.R. 47 Cal. 175 (P.C.).

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1911 and 1926. The fact that on account of the state of work in this Court this appeal has been pending from 1930 till 1936, should not be allowed to prejudice the appellants' claim to indulgence if otherwise they are entitled to any indulgence at our hands.

Mr. Jayarama Aiyar next contended that by reason of the order already passed in proceedings under O. 9, r. 13, Civil Procedure Code, the appellants were no longer entitled to raise any point in appeal justifying their request for an opportunity to adduce evidence or for a fresh trial. The facts bearing on this contention are as follows. After some adjournments, the suit came on for hearing on the 8th August, 1928. Leaving alone certain discrepancies between the various affidavits filed in the case, the events of that date may substantially be taken to have been the following. The contesting defendants had engaged Mr. M. S. Sesha Aiyangar (one of the leading members of the Madura bar) and a junior as their Counsel. When the case was first called between 11 and 12 noon on the 8th August, it was represented to the Court by the junior vakil that Mr. Sesha Aiyangar had gone to the District Magistrate's Court to attend to some work there because he had been led to think that the Sessions case which had been posted for trial before the learned Subordinate Judge would take sometime. It is not denied that there was a Sessions case posted for trial that day but it would appear that for some reason it did not take as long as was originally expected. The junior Counsel requested that the case may be taken up sometime later in the day and stated that Mr. Sesha Aiyangar would be sent for. At 12-30 P.M. the case was again called. It was represented to the Court that a man had been sent to fetch Mr. Sesha Aiyangar and that he would be going over almost immediately. The learned Judge was good enough to wait till one o'clock but as he had no other work to do that day he was unable to wait longer and he began the trial of the case. It is not denied that the first defendant was in Court at the time, and she was acting for herself and as guardian *ad litem* of her minor son the fourth defendant. For reasons which I certainly do not wish to be understood as at all approving of or even as prepared to condone, the junior vakil in the case was not prepared to take upon himself the duty either of cross-examining the plaintiff's witnesses or of leading evidence on behalf of his clients. The result was that the

learned Judge recorded the examination-in-chief of the witnesses tendered on the plaintiff's side and immediately delivered judgment in favour of the plaintiff.

It is necessary to refer to one observation in paragraph 5 of his judgment because it is obviously a mistake. After observing that the defendants have not let in any evidence to show that the deed was nominally executed, he goes on to say, "They did not even take steps in time". This is certainly an unfortunate mistake. The affidavits sworn to, not merely by the first defendant but also by the three witnesses who had attended the Court on her behalf on the 8th August, and filed in Court on the 9th August, show that these three witnesses had been summoned to give evidence on the defendants' side and that they were present in Court on the 8th till 3 P.M. when they were informed that the case had been disposed of *ex parte*, that the defendants' vakil could not appear and that they need not wait any longer. We are not in a position to say whether the learned Judge was informed or whether he realised that the defendants' witnesses were present in Court. In the view that the defendants had not taken any steps in time to substantiate their plea, the learned Judge might well have thought that the defendants were merely trying to obstruct the trial of the suit by putting forward frivolous pleas to substantiate which they took no steps. This would naturally have added to the impression produced on his mind by the absence of their vakil. If on the other hand he believed that the defendants and their witnesses were ready in Court it would certainly not have led him to think that the defendants were not serious about their plea.

After a decree had been passed in plaintiff's favour, on the 8th August, an application under O. 9, r. 13, Civil Procedure Code, was made on the very next day to set aside the *ex parte* decree. Notice of that application was issued during the incumbency of the same Judge, but it came on for final orders before his successor, who took a somewhat lenient view of the situation and directed the *ex parte* decree to be set aside on terms. But when the matter came up on revision before this Court, Jackson, J., was of opinion that while it might be possible to hold on the facts that there was non-appearance within the meaning of O. 9, r. 13, Civil Procedure Code, it was not possible to hold that there was sufficient cause for non-

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appearance. He accordingly set aside the lower Court's order, with the result that the original decree stood. The present appeal has been filed as a regular appeal against the decree itself.

On the above facts, it has been argued by Mr. Jayarama Aiyar that the order passed by this Court on the petition under O. 9, r. 13, Civil Procedure Code, precludes the appellants from re-agitating the same question in the appeal. Reliance was placed in support of this position on the decisions in *Badvel Chinna Asethu* v. *Vattipalli Kesavayya*[1] and *Lakshmi Ammal* v. *Devadasi Nayudu*[2]. I am prepared to assume for the purpose of this case that on general principles some finality should attach to the order passed by the Court in proceedings under O. 9, r. 13, Civil Procedure Code. But the very reasoning of the decisions relied on by the respondent limits that finality to matters within the scope of O. 9, r. 13. On the facts of this case, it is difficult to hold that the grounds on which the application under O. 9, r. 13 was sought to be supported are really grounds falling under O. 9, r. 13 at all. Jackson, J., no doubt was prepared to assume that the facts might have amounted to non-appearance but as he was deciding against the defendants on other grounds, it can hardly be regarded as a decision on that question. It seems to me to be straining the natural inference from the facts to hold that the case was really one under O. 9, r. 13. The facts that a party wrongly put in an application under O. 9, r. 13, Civil Procedure Code, will not bring in any rule of finality merely because the Court refused to regard the case as a fit one for setting aside the *ex parte* decree.

It may also be pointed out that even taking the events to amount to non-appearance and that too, for no justifiable cause, we are not now called upon to set aside the *ex parte* decree or re-consider these very grounds. As I have stated already, the contesting defendants were a Muhammadan lady and her minor son. The lady was certainly not guilty of any default; she had engaged vakils, had summoned witnesses and she and her witnesses were present in Court. Her senior vakil was absent and her junior vakil was either absent according to his affidavit or was not prepared to go on with the case accord-

1. (1920) 39 M.L.J. 697. 2. (1926) 100 I.C. 553.

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ing to the other affidavits. A request was made that the case might be taken up after the senior vakil arrived but in view of the state of work before the Court that day the learned Judge was not inclined to grant the request to the full extent required. In this appeal, we confine ourselves to the question whether it would not have been better, in the interests of justice, having regard especially to the fact that the contesting defendants were a Muhammadan lady and her minor son, for the Court to have adjourned the case so as to give the defendants an opportunity to cross-examine the plaintiff's witnesses and to lead evidence on their own behalf.

I once again wish to make my position clear, that I am not to be understood as justifying the course adopted by the junior vakil in the circumstances. I regret to say from my own experience that members of the bar too often think that they were serving their clients' interests by running away from the case when the senior is not available. Courts have frequently re-iterated their unwillingness to interfere in such cases under O. 9, r. 13, Civil Procedure Code. It seems to me that conduct of this kind is certainly not calculated to help the clients concerned. And from the point of view of the vakil concerned, one can only express the strongest disapproval of such a course. But I am unable to agree with Mr. Jayarama Aiyar that in such a case the Court is powerless to interfere to help the client in the interests of justice and must leave the client to his or her remedy against the vakil. The remedy against the vakil is to say the least problematical and it may also be that the fruits of any decree that the client may obtain on the ground of negligence will not by any means compensate the client for the loss of his case. I am not at all sure that it would inevitably follow from the interference of the Court in one of such cases that it will either become a precedent or will justify interference of the Court in all cases where the vakil has neglected the conduct of the client's case. The Court must always be satisfied that there has been no kind of default on the client's part and that the circumstances were such as to leave the client helpless to proceed further with the conduct of the case. The plea of prejudice to the other side has no doubt to be considered, but there are other ways in which the other side can be compensated for any possible prejudice that may be caused by the Court's interference.

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I should like to indicate another point of view in this connection. Suppose, for instance, that at the time the case was taken up on the 8th August, the client who found that the senior vakil was absent and the junior was unable or unwilling to go on with the case, represented to the Court that she had been badly let down by her legal advisers and that she must have time to engage another vakil to take charge of the case. Mr. Jayarama Aiyar was not prepared to go the length of saying that a request of that kind was one which the Court should reasonably refuse. But he said that that is not the case here, because the kind of request was not made by the first defendant. I cannot altogether ignore what I know of the mentality of the clients in this country. They are not as ready to find fault with their legal advisers as they may be entitled in law to do. In this very case, if she had made that request to the Court she would have to find means to engage another vakil, and if by the next morning the original senior vakil was available it would have been an unnecessary strain on her purse to insist upon another vakil appearing.

These reasons stand in the way of my laying it down as any rule of *law* that in a case of this kind the Court is bound to visit upon the client the consequences of the omission of the vakil or vakils in the case to do their duty. If I had any reason to think that the defendants had not done their duty to facilitate the conduct of the case, I should certainly have little sympathy with the request now made on their behalf. But on the facts and for the reasons already stated, I am unable to uphold Mr. Jayarama Aiyar's objection that we are precluded from acceding to the request made on behalf of the appellants.

In this connection I may refer to the judgment of the Patna High Court in *Mullick* v. *Ganga Gope*[1] where they distinguish the case reported in *Badvel Chinna Asethu* v. *Vattipalli Kesavayya*[2] and point out that the orders passed on an application under O. 9, r. 13, Civil Procedure Code, do not stand in the way of the Court considering the merits of the question whether in the circumstances of the case an adjournment should have been granted or not.

Mr. Jayarama Aiyar finally contended that if we show any indulgence to the appellants we must at least put them on

1. A.I.R. 1925 Pat. 534: 7 P.L.T. 381. 2. (1920) 39 M.L.J. 697.

terms. This request is certainly reasonable. Two sets of terms were suggested; one a limitation of the class of witnesses to be examined and the other a provision as to the costs so far incurred by the plaintiff. We think it proper to leave the latter question to be decided at a later stage, when the evidence and findings that we propose to call for will be before the Court. We will then be in a better position to exercise our discretion in this matter. As regards the witnesses to be called by the contesting defendants to give evidence, I think there is some force in Mr. Jayarama Aiyar's objection that we should not encourage the possibility of witnesses now being placed before the Court for the first time who had never been thought of before. We would therefore in the first instance limit the contesting defendants to the examination of the witnesses summoned on their side in connection with the former hearing and to the witnesses whose names have been specified in the list filed on their behalf even though they had not been summoned. It has however been represented to us that in view of the time that has elapsed, some of the witnesses then thought of might not be available. All that we can do at this stage is to leave it to the lower Court to consider whether any of the witnesses now sought to be produced on the appellants' side for the first time have really become necessary by reason of causes of the kind above indicated. I do not wish to fetter the discretion of the lower Court by any further observations. If it is satisfied that the appellants had *bona fide* reasons for not calling them or citing them on the previous occasion it will be at liberty to permit the appellants to examine them now. The appellants will of course be given an opportunity of cross-examining the plaintiff's witnesses who were examined on the previous occasion as well as any other witnesses that the plaintiff might choose to examine. The plaintiff will be at liberty to examine once again the witnesses examined on the previous occasion and any other witnesses whom he may consider necessary.

In the circumstances of this case I do not think it desirable to set aside the decree and send the case as a whole back to the lower Court. The case had been pending so long that it seems better to direct the lower Court to record the evidence and admit any documentary evidence that the parties might tender in the light of the observations made above and to submit a revised finding on the first issue. The finding will be

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submitted before the 31st October, 1936. Ten days for objections (after the return of the finding shall have been posted up in the notice board of the High Court).

Mockett, J.—I agree with the order proposed by my learned brother. I desire to limit the reasons on which I agree to one. It must be remembered that we are hearing an appeal against a decree in the suit in question which was passed on 8th August, 1928, a decree which had interesting subsequent history. But it is that decree which is before us. Now my learned brother has narrated the events that happened in Court on the day that this *ex parte* decree was passed and it is unnecessary for me to repeat them. But it is perfectly clear that owing to the very peculiar behaviour of the pleaders engaged by the contesting defendants to this case the learned Judge's mind might have inadvertently been full, at least of doubt, if not of suspicion with regard to the *bona fides* of the defendants themselves.

In paragraph 5 of his judgment the learned Judge says as follows:

"Defendants have not let in any evidence to show that the deed was nominally executed. They did not even take steps in time."

According to the B diary it is stated under date 8th August, 1928:

"Defendants have no evidence. The maintenance of this B diary may be of assistance, but the statement in it is not final."

Now in this case it is clear that on the application to set aside the *ex parte* decree the petitioner stated quite clearly in her own affidavit and it is also stated in the affidavits of three other persons that there were three witnesses, that they were summoned, and that they did attend Court at 11 A.M. on the day in question. This fact curiously enough is not contradicted in the counter-affidavit. It is therefore quite clear that the learned Judge was under a great misapprehension when he stated that no steps had been taken by the contesting defendants in the case. I think that a Judge who had to determine on that day whether to proceed or not with the case must have had his judgment completely swayed by the circumstance that no evidence had been brought to the Court to prove an issue which the defendants would have to prove. It would be inevitable in my view that the result would follow which did follow, namely, that he passed an *ex parte* decree, no doubt taking the

view that this was merely a time-serving case without any substance whatever in it. Immediately however it appears, as we now know, that there was a genuine attempt to defend this matter. I think the decree itself becomes vulnerable and so vulnerable that it is open to us to say that we should pass an order enabling the appellants in this case to have the limited hearing which we have indicated. On these grounds I agree as I said with my learned brother's proposed order.

With regard to the behaviour of the pleaders concerned I only wish to say this that if it were not for the difficulty relating to the supposed absence of the defendants' witnesses I should with regret have been unable to agree that the conduct of the pleaders alone was such as to enable us to pass any order in favour of the appellants. I think that our position is very similar to that of a Judge sitting in revision considering an application under O. 9, r. 13, Civil Procedure Code. I would refer to the observations in *Abdul Aziz* v. *The Punjab National Bank, Limited,*[1] where it is stated that the absence of a pleader is not in any way final one way or the other in considering whether a decree should or should not be set aside. It is stated there, that there should be a judicial enquiry in each case into the particular facts relating to the absence of the particular pleader on the particular occasion. I think that that is a very sound test because it does not lay down any general rule in this matter. I think that this test must be applied in this case.

It is not possible to say that the absence of the pleaders was excusable and much as I regret it I think it is inevitable that the client in these circumstances would have had to suffer. It is the result of what I suppose is a lack of judgment in choosing legal advisers. As however I am agreeing with the order proposed by my learned brother it is unnecessary to say more on this particular topic.

I have only to add that I agree with the observations which my learned brother has made relating to the frame of the suit and the opinion which he has indicated regarding the decisions in *Sunitabala Debi* v. *Dhara Sundari Debi Chowdhurani*[2] and also the decision of this High Court in *Gopalu Pillai* v. *Kothandarama Aiyar*[3].

1. (1928) I.L.R. 10 Lah. 570.
2. (1919) 37 M.L.J. 483: L.R. 46 I.A. 272: I.L.R. 47 Cal. 175 (P.C.).
3. (1934) 67 M.L.J. 843: I.L.R. 57 Mad. 1082.

Peer Ammal *v.* Nallu-swami Pillai.

[In pursuance of the above order calling for a revised finding, the Subordinate Judge of Madura submitted a revised finding and this appeal coming on for final hearing on Friday, the 30th day of April, 1937, after such revised findings the Court delivered the following

Varada-chariar, J.

JUDGMENT.] *Varadachariar, J.*—Some of the facts of this case have been stated in our order dated the 21st July, 1936, whereby we set aside the decree which had been passed by the trial Court in this suit in the first instance without an opportunity for the defendants to prove their case. We then asked the lower Court to submit a revised finding on the first issue after a full trial; the lower Court has now submitted a finding in favour of the defendants on that issue.

It is sufficient to say that the appeal arises out of a suit on a mortgage bond (Ex. A) executed by one Peer Muhammad in favour of his son-in-law Alla Pichai, on 18th September, 1911. This action has been instituted on the last day of the period of limitation of 12 years calculated from the expiry of the three years' term fixed in the mortgage bond. Both the mortgagor and the mortgagee are dead and admittedly there have been disputes and misunderstandings between their heirs. The plaintiff purports to sue as assignee of the mortgage claim for consideration paid by him in cash to one set of heirs of the mortgagee. The mortgagor's heirs pleaded that the mortgage bond was a nominal transaction, that no money was ever received under it and that the plaintiff was not an assignee for value at all. On these pleas, the first issue was raised in the following terms:

"Whether the mortgage bond sued on is true and supported by consideration."

The finding now is to the effect that the document is no doubt true in the sense that it was executed by Peer Muhammad Rowther but it was not supported by any consideration.

This finding has been attacked on behalf of the appellant, as one arrived at without giving sufficient weight to the rule that the onus in a case of this kind lies on the mortgagor's heirs to prove absence of consideration. It has also been contended that the observations of the Court below as to the *bona fides* of the plaintiff in taking the assignment and as to the

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truth or otherwise of his story as to payment of consideration for the assignment are irrelevant, particularly in view of the fact that we had not called upon the lower Court to submit a finding on the second issue. It was finally urged that the contesting defendants on whom the onus lies have not adduced satisfactory evidence to prove absence of consideration.

We may state at the outset that in a case of this kind the conclusion must largely rest upon probabilities and not upon direct evidence and it is much more so where the principal parties connected with the transaction have died. Besides the relationship of father-in-law and son-in-law between the mortgagor and the mortgagee it is also clear from the evidence that the alleged mortgagee was a man of very small means, who came to live with his father-in-law after he had married the latter's daughter and was then started on business in a very small way. It is difficult to believe that in a very short time thereafter he could have found a sum of Rs. 3,000 to lend to his father-in-law. On the other hand, there is a certain amount of evidence which the lower Court has accepted that the father-in-law was in some financial embarrassment at that time, though he was also possessed of property, and it is not unlikely that he resorted to a benami transaction of this kind with a view to gain time to settle affairs with his creditors. The direct evidence on the plaintiff's side in support of payment of consideration is very poor and was rightly discredited by the learned Judge. In our opinion, a very material circumstance tending against the reality of the mortgage is that within 8 or 9 months after its date, the father-in-law brought into existence a nominal document (Ex. 9) purporting to sell a good portion of the hypothecated property to D. W. 4. D. W. 4 belongs to a different community and has no interest in either of the parties. He has sworn that in connection with Ex. 9 both the father-in-law and the son-in-law came to him and stated that they found it expedient to put the properties covered by Ex. 9 for the time being benami in the name of D. W. 4 and it was also stated to him in that connection that the mortgage under Ex. A the discharge of which was stated to be the consideration for the sale under Ex. 9, was also a benami document. The nominal character of Ex. 9 has not been seriously questioned. Nothing whatever has been elicited in the cross-examination of D. W. 4 to suggest that the evidence of this witness ought

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Varadachariar, J.

not to be believed. The fact that during all the time that the father-in-law and the son-in-law lived and for many years after their death, not a pie has been demanded or paid towards the mortgage debt, even though one of the items covered by the mortgage (namely, a debt due to the mortgagor under Ex. 11) was realised by the mortgagor also goes to support the story that Ex. A did not represent a real loan. In these circumstances we see no reason to differ from the finding of the lower Court that Ex. A is not supported by consideration. The appeal must therefore be allowed and the suit dismissed with costs of the appellants here and in the lower Court, including the costs of the finding enquiry.

S. V. V. —— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD ALNESS, SIR SHADI LAL AND SIR GEORGE RANKIN.

Mangal Singh .. *Appellant**

v.

The King-Emperor .. *Respondent.*

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Mangal Singh v. King-Emperor.

Criminal trial—Offence of murder—Circumstantial evidence—Inference as to guilt of accused—Conclusion of Courts in India—Interference by Privy Council—Indian Penal Code (1860), Ss. 201 and 302—Charge for offence of murder—Decision of Judge or jury as to proof of guilt—Procedure for convicting accused for lesser offence.

The evidence against the accused who was charged with murder was as follows. It was proved that the accused had conceived an enmity against the deceased. It was further proved that the accused was seen by two witnesses, on the night of the alleged murder, digging in the rectangle of the field where the body of the deceased was subsequently discovered. To those witnesses the accused explained that he was digging out the stump of a tree. It was also proved that the accused gave false information when there was a search for the deceased. And it was further proved that there was human blood upon the loin cloth belonging to the accused, although it had apparently been washed. On this evidence the Sessions Judge and the High Court convicted the accused of an offence under S. 302, Indian Penal Code. The accused having preferred an appeal to the Privy Council after obtaining special leave,

Held, that the Courts in India were well entitled to convict the accused for the offence of murder on the evidence disclosed, and that the case did not call for interference by the Board there being no miscarriage of justice.

Begu v. *The King-Emperor,* (1925) 48 M.L.J. 643: L.R. 52 I.A. 191: I.L.R. 6 Lah. 226 (P.C.), referred to.

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* P. C. Appeal No. 98 of 1936. 19th February, 1937.

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In a case such as this the Court having settled the legal criterion applicable—namely, whether the evidence led would satisfy the jury beyond reasonable doubt of the guilt of the accused—it is then for the jury, or for the Judge if there be no jury, to say whether, applying that criterion to the facts proved the verdict should or should not be one of guilty. The proper avenue of approach in the case is, first and foremost, to consider whether the offence under S. 302 of the Indian Penal Code has been made out. If so, that is an end of the matter. If, on the other hand, the case under that section is held not proved, then, and only then, would it be proper to consider whether an offence under S. 201 of the Penal Code has been established.

Wills' Circumstantial Evidence, 6th edition, p. 311, r. 4, relied on.

Decision of the Lahore High Court in *Mangal Singh* v. *Emperor*, (1936) I.L.R. 17 Lah. 547, affirmed.

Appeal by special leave from a judgment of the High Court of Lahore, dated 27th April, 1936, which confirmed a judgment of the Sessions Judge of Montgomery, dated 13th February, 1936.

Rashid for Appellant.

Wallach for Respondent.

19th February, 1937. Their Lordships' judgment was delivered by

Lord Alness.

LORD ALNESS.—This is an appeal by special leave from a judgment and order of the High Court of Judicature at Lahore, dated 27th April, 1936, which affirmed the conviction of the appellant and the sentence of death passed upon him by the Sessions Judge of Montgomery, dated 13th February, 1936.

The following is a summary of the relevant facts:—One Narain Singh married a widow, Musammat Harnam Kaur, who died in or about the year 1931. The appellant is her son by a previous marriage. By her marriage with Narain Singh she had four sons, the eldest being Kartar Singh. After the death of Musammat Harnam Kaur, Narain Singh indulged in a *liaison* with his widowed sister-in-law Musammat Basant Kaur.

In the early part of October, 1935, Narain Singh disappeared from his home. Following upon a *panchayat*, searchers, including the appellant, were despatched with a view to finding the missing man. On 13th October, the searchers, other than the appellant, returned unsuccessfully from the search. The appellant was not seen again till he was arrested on 15th October. Another *panchayat* was meantime convened. Kartar Singh was questioned as to his father's whereabouts, and, in consequence of the disclosures made by him, informa-

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tion was lodged with the police. Kartar Singh took the police to a field which belonged to Narain Singh, and there, after digging four feet or thereby, the dead body of Narain Singh was found.

The appellant and his half-brother, Kartar Singh, were tried, on 11th February, 1936, by the Sessions Judge, with the aid of four assessors, on the following charge:—

"That you, on or about the 2-3 night of October, 1935, at 139/9-L did commit murder by intentionally causing the death of Narain Singh and thereby committed an offence punishable under S. 302 of the Indian Penal Code, and within Sessions cognizance."

Both the accused pleaded not guilty, but led no evidence. At the end of the trial the assessors held that the appellant was guilty of murder, but that Kartar Singh was not, though they were of opinion that, acting under the influence of the appellant, he helped to dispose of the dead body of Narain Singh. On 13th February, 1936, the learned Sessions Judge delivered judgment. He found the appellant guilty of murder, and sentenced him to death. He found Kartar Singh guilty of an offence under S. 201 of the Indian Penal Code, and sentenced him to three years' rigorous imprisonment.

Both the accused appealed to the High Court at Lahore, who, after argument, dismissed the appeal, found the appellant guilty of the murder charged against him, and confirmed the sentence of death passed upon him by the learned Sessions Judge. The High Court, however, reduced the sentence on Kartar Singh to one year's rigorous imprisonment, and recommended that the Government should place him in a Borstal or other similar institution to serve his sentence.

The appellant thereupon presented a petition to His Majesty in Council, asking for special leave to appeal against his conviction and sentence. On 26th September, 1936, the special leave sought was granted. The appellant then preferred this appeal, praying that the judgment of the High Court should be set aside, and that his conviction should be quashed.

Counsel for the parties have been fully heard, and their Lordships have carefully considered the case in light of the argument submitted. Their Lordships have, in the result, already intimated that they would humbly advise His Majesty to refuse the appeal, and they stated that they would give their reasons for this course at a later stage. This they now propose to do.

The case for the prosecution is based on circumstantial evidence. The following are the principal incidents, the cumulative effect of which, it was contended and successfully contended, established the guilt of the appellant:—

It was proved that the appellant had conceived an enmity against the deceased because he was expending his income upon his paramour, Musammat Basant Kaur.

It was further proved that the appellant was seen by two witnesses, on the night of the alleged murder, digging in the rectangle of the field where the body of the deceased was subsequently discovered. Kartar Singh was standing by. To the two witnesses who observed them on this occasion the appellant explained that he was digging out the stump of a tree.

It was also proved that the appellant, reading from a postcard which he professed to have received, informed Musammat Basant Kaur that Narain Singh was lying ill at the Akali Hospital at Amritzar, and that she and Kartar Singh went there, upon receiving this information, only to find that Narain Singh had never been at the hospital. Musammat Basant Kaur asked the appellant for the postcard, but he stated that he had lost it.

It was further proved that there was human blood upon the appellant's loin cloth when he was arrested, although it had apparently been washed.

Their Lordships are satisfied, upon this evidence—unexplained, as it was—and, having regard to its cumulative effect, that the Courts in India were well entitled to convict the appellant of murder. As has frequently been stated by this Board, it is no part of their duty to sit in such a case as this as a Court of Criminal Appeal, but only to correct what they regard as a miscarriage of justice, if it has occurred. Reference may again be made, in that connection, to the observations of Viscount Haldane in the case of *Begu* v. *The King-Emperor*[1]. Their Lordships are satisfied that there has been no miscarriage of justice in this case, and nothing which, in accordance with well-settled principles, would warrant their interference with the judgment of the High Court at Lahore.

Two further matters fall to be mentioned. The learned Sessions Judge in his judgment proceeded in part upon a con-

1. (1925) 48 M.L.J. 643: L.R. 52 I.A. 191 at 195: I.L.R. 6 Lah. 226 (P.C.).

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fession which was alleged to have been made by Kartar Singh, and which implicated the appellant in the murder. The High Court held that the alleged confession was inadmissible in evidence against the appellant, and arrived at their conclusion of his guilt independently of the confession. Their Lordships have followed the same course, and, being satisfied that the evidence, *dehors* the alleged confession, was sufficient to warrant the conviction of the appellant, find it unnecessary to pronounce on the admissibility or inadmissibility of the alleged confession, and they abstain from doing so.

The second matter is this. The High Court at Lahore appear to have thought that it had been held in India that it was not in law open to a Court or jury to convict the accused of murder in such circumstances as exist here. Their Lordships have had the advantage of examining the Indian cases which were supposed by the High Court to yield this inference, and they are clearly of opinion that it is based on a misapprehension. Having settled the legal criterion applicable to such a case as this—namely, whether the evidence led would satisfy the jury beyond reasonable doubt of the guilt of the accused—it is then for the jury, or for the Judge, if there be no jury, to say whether, applying that criterion to the facts proved, the verdict should or should not be one of guilty. (*Cf.* Wills' Circumstantial Evidence, sixth edition, p. 311, r. 4.) That, their Lordships apprehend, is the law of England to-day, and they cannot find, upon examination, that the Courts in India have held or expressed a different view.

Their Lordships should perhaps add that they have reached the conclusion stated apart altogether from consideration of the terms of S. 201 of the Indian Penal Code. It appears to them that the proper avenue of approach in this case—particularly having regard to the structure of the charge—is, first and foremost, to consider whether the case under S. 302 of the Indian Penal Code has been made out. If so, that is an end of the matter. If, on the other hand, their Lordships thought that the case under that section was not proved, then, and only then, would it be proper to consider whether an offence under S. 201 of the Indian Penal Code had been established.

Solicitors for Appellant: *Nehra & Co.*

Solicitors for Respondent: *Solicitor, India Office.*

R. C. C. — *Appeal dismissed.*

B. V. V.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD THANKERTON, SIR SHADI LAL AND SIR GEORGE RANKIN.

The Surat Cotton Spinning and Weaving Mills, Limited .. *Appellants**

v.

The Secretary of State for India in Council Manager and Proprietor for the East Indian Railway Administration Head Office, Calcutta .. *Respondent.*

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Surat Cotton Spinning and Weaving Mills, Ltd. *v.* Secretary of State for India in Council.

Railways Act (IX of 1890), S. 72—Risk-note Form B—Loss of goods at intermediate station—Locks and door of wagon broken open—Guard of railway being in position to explain—Failure of Railway Company to examine —Adverse inferences under S. 114, Ill. (g), *Evidence Act, 1872—Complicity of servants of Railway in theft—Liability of company for loss.*

The appellants consigned certain bales of cotton piece goods to the B. B. & C.I. Ry. Co. at Surat for carriage to Sealdah on the E.B. Ry., a Government Railway, on the terms of the Risk-note B. In order to reach the system of the E. B. Ry. the consignment had to be carried for a considerable distance over the E. I. Ry. also owned by the Government. The Risk-note which was in Form B, approved by the Governor-General in Council under S. 72 (*b*) of the Railways Act provided as follows: "Whereas consignment is charged at special reduced rate . . . . we do in consideration of such lower charge agree and undertake to hold the said railway administration harmless and free from all responsibility for any loss . . . of the said consignment . . . Provided that in the following cases (*a*) non-delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment . . . where such non-delivery is not due to accidents to trains or to fire; (*b*) pilferage from a package or packages forming part of the said consignment . . . when such pilferage is pointed out to the servants of the railway administration on or before delivery; the railway administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or its control, and if necessary to give evidence thereof before the consignor is called upon to prove misconduct but if misconduct on the part of the Railway administration or its servants cannot be fairly inferred from such evidence the burden of proving such misconduct shall lie upon the consignor." The consignment was loaded at Surat in an old wagon with two side doors and a lower flap door and the door fastened with rivets. Subsequently the wagon was handed over to the E. I. Ry. and locks were then substituted for the rivets on both sides of the wagon. Some of the bales were stolen during their transit on the E. I. Ry. after breaking open the seals and locks on the wagon and the question arose whether the owner could recover damages from the E. I. Ry. It was shown that the Railway company had failed to examine the guard of the goods train who was in a position to give very relevant evidence about the loss of the goods. It was also shown that the

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* P. C. Appeal No. 57 of 1936. 5th March, 1937.

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goods were lost by theft during transit after breaking open the locks and rivets.

Held, that the Railway company having failed to submit the evidence of the guard was in breach of its contractual obligation to give necessary evidence for disclosure of how the consignment was dealt with and the Court could under the circumstances presume under S. 114, Ill. (*g*) of the Evidence Act that such evidence if produced would be unfavourable to the Railway company, and infer misconduct, by complicity in the theft by some members of the railway company, and that the plaintiff's claim should be allowed.

Decision of the Bombay High Court reversed.

Appeal from a decree of the High Court of Bombay dated 21st December, 1934, reversing a decree of the First Class Subordinate Judge of Surat dated 30th April, 1928.

Pritt, K.C. and *Sir Thomas Strangman* for Appellants.

Sir Walter Monckton, K.C. and *Henry C. Dickens* for Respondent.

5th March, 1937. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—This is an appeal from a judgment and decree of the High Court of Judicature at Bombay, dated the 21st December, 1934, which dismissed the appellants' suit, in reversal of a decree of the First Class Subordinate Judge of Surat, dated the 30th April, 1928, under which the appellants obtained decree for the sum of Rs. 25,820 with future interest at 6 per cent.

On the 7th April, 1925, the appellants consigned 58 bales of cotton piece goods to the Bombay Baroda and Central India Railway Company, at Surat, for carriage to Sealdah on the Eastern Bengal Railway, a Government railway, on the terms of Risk Note B. In order to reach the system of the Eastern Bengal Railway, the consignment had to be carried for a considerable distance over the system of the respondent's East Indian Railway, which may be referred to as the East Indian Railway.

Risk Note B is in the form approved by the Governor-General in Council under S. 72 (2) (*b*) of the Indian Railways Act, 1890, for use when the goods are despatched at a "special reduced" or "owner's risk" rate. In the present case the material part of the Risk Note is as follows:—

Whereas consignment of fifty-eight bales F. P. C. P. Goods I. B. tendered by us as per forwarding Order No. 666 of this date for despatch by the B.B. & C. I. Railway Administration to Sealdah station and for which we have received Railway receipt No. 942 of same date is charged at a special reduced

rate instead of at the ordinary tariff rate chargeable for such consignment, we the undersigned do in consideration of such lower charge agree and undertake to hold the said railway administration harmless and free from all responsibility for any loss, destruction or deterioration of or damage to the said consignment from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration's servants: Provided that in the following cases:—

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(*a*) Non-delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment packed in accordance with the instruction laid down in the Tariff or where there are no such instructions protected otherwise than by paper or other packing readily removable by hand and fully addressed where such non-delivery is not due to accidents to trains or to fire.

(*b*) Pilferage from a package or packages forming part of the said consignment properly packed as in (*a*) when such Pilferage is pointed out to the servants of the railway administration on or before delivery.

The railway administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and if necessary to give evidence thereof before the consignor is called upon to prove misconduct but if misconduct on the part of the railway administration or its servants cannot be fairly inferred from such evidence the burden of proving such misconduct shall lie upon the consignor.

This agreement shall be deemed to be made separately with all railway administrations or transport agents or other persons who shall be carriers for any portion of the transit.

Of the 58 bales consigned, only 15 were delivered to the consignee at Sealdah, the remaining 43 bales having been stolen while in course of transit on the E. I. Railway. The present suit was filed on the 20th March, 1926, by the appellants, claiming damages for the non-delivery of the 43 bales. No question is raised in the appeal as to the amount of the damages assessed by the Subordinate Judge, but the issue is as to the liability of the respondent, in view of the terms of Risk Note B, and, in particular, of the terms of the proviso, as the present case comes within case (*a*) of the proviso. It will be convenient to consider first the proper construction of the proviso, which contains two distinct provisions.

The first portion of the proviso lays an obligation of disclosure on the railway administration, the nature and extent of which it will be necessary to consider. The second portion of the proviso assumes that the obligation of disclosure, including the giving of the necessary evidence, has been discharged, and, impliedly, directs consideration of the material so disclosed before the consignor is relegated to the original burden of proof of misconduct laid upon him; if such consideration leads to the fair inference of misconduct, the

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railway administration will be liable; otherwise, the proviso will cease to operate, and the consignor will be relegated to his original burden of proof of misconduct. No question of misconduct of the railway administration, as distinct from its servants, arises in the present case, but it may be noticed that reference to such misconduct occurs only in the second portion of the proviso, and does not occur in the original obligation of proof laid upon the consignor. Their Lordships reserve any opinion as to the construction of this bit of imperfect draughtsmanship.

The first portion of the proviso provides that the railway administration shall be bound to disclose to the consignor "how the consignment was dealt with throughout the time it was in its possession or control, and, if necessary, to give evidence thereof, before the consignor is called upon to prove misconduct." In their Lordships' opinion, this obligation arises at once upon the occurrence of either of cases (*a*) or (*b*), and is not confined to the stage of litigation. Clearly one object of the provision is to obviate, if possible, the necessity for litigation. On the other hand, the closing words of the obligation clearly apply to the litigious stage. As to the extent of the disclosure, it is confined to the period during which the consignment was within the possession or control of the railway administration; it does not relate, for instance, to the period after the goods have been theftuously removed from the premises. On the other hand, it does envisage a precise statement of how the consignment was dealt with by the administration or its servants. The character of what is requisite may vary according to the circumstances of different cases, but, if the consignor is not satisfied that the disclosure has been adequate, the dispute must be judicially decided. As to the accuracy or truth of the information given, if the consignor is doubtful or unsatisfied, and considers that these should be established by evidence, their Lordships are of opinion that evidence before a Court of law is contemplated, and that, as was properly done in the present suit, the railway administration should submit their evidence first at the trial.

At the close of the evidence for the administration two questions may be said to arise, which it is important to keep distinct. The first question is not a mere question of procedure, but is whether they have discharged their obligation of

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disclosure, and, in regard to this, their Lordships are of opinion that the terms of the risk note require a step in procedure, which may be said to be unfamiliar in the practice of the Court; if the consignor is not satisfied with the disclosure made, their Lordships are clearly of opinion that is for him to say so, and to call on the administration to fulfil their obligation under the contract, and that the administration should then have the opportunity to meet the demands of the consignor before their case is closed; any question as to whether the consignor's demands go beyond the obligation should be then determined by the Court. If the administration fails to take the opportunity to satisfy the demands of the consignor so far as endorsed by the Court, they will be in breach of their contractual obligation of disclosure.

The other question which may be said to arise at this stage is whether misconduct may be fairly inferred from the evidence of the administration; if so, the consignor is absolved from his original burden of proof. But, in this case, the decision of the Court may be given when the evidence of both sides has been completed. It is clearly for the administration to decide for themselves whether they have adduced all the evidence which they consider desirable in avoidance of such fair inference of misconduct. They will doubtless keep in mind the provisions of S. 114 of the Indian Evidence Act.

Turning to the facts of this case, the following facts may be taken as not in dispute. The consignment was loaded at Surat E.I. Railway wagon No. 11893, which was an old type of wagon with two side doors and a lower flap door, and the doors fastened with rivets. On the 17th April, 1925, the wagon was handed over to the E.I. Railway at Agra East Bank Station, and Ellis patent locks were substituted for the rivets on both sides of the wagon. The wagon was despatched to Moghal Serai, where it was attached to goods train No. 132 down. The train consisted of 55 wagons, the wagon in question being 35th from the engine, and its locks and seals being then intact. The train was in charge of Guard J. Rohead from this point until Dinapore, a distance of about 125 miles. The times of down goods train 132 on this section, so far as given in evidence, were as follows:—

21st April, 1925. Moghal Serai, dep. 20.30.
22nd ,, ,, Buxar, arr. 0.6, dep. 0.45.

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Baruna, run through 1.11.
Ragnathpura, arr. 2.2, dep. 2.22.
Arrah, arr. 3.57, dep. 5.0.
Dinapore, arr. 6.55.

Between Moghal Serai and Dinapore there are three stations, Dildarnagar, Buxar and Arrah, at which it is the duty of the guard—alone, or jointly with the railway police constable on duty—to check the seals and locks on both sides of the train. There is no evidence as to what happened at Dildarnagar, which is between Moghal Serai and Buxar. But there is nothing in the evidence to suggest any interference with the seals or locks before the train reached Buxar Station.

On the arrival of the train at Dinapore it was discovered that the seals and locks on the south or off side of the wagon in question had been broken and that only 15 bales were left, 43 having been removed. Guard Rohead then made a report at Dinapore, which will be referred to later.

Meantime, up goods train 137, which had passed down goods train 132 between Ragnathpura and Baruna, and which had run through Baruna at 1.40 was stopped by the discovery of goods on the line about two miles east of Buxar; these proved to be four unbroken bales and some thans, or loose pieces of cloth, which had formed part of the appellants' consignment. These were taken to Buxar Station. At the point where up goods train 137 stopped, the guard saw 25 or 30 men outside the railway fence armed with lathis. Later, another train, No. 15 up express, which had left Ragnathpura at 3.15, was stopped shortly before reaching Baruna by the discovery of some thans, which were also identified as having formed part of the appellants' consignment. The railway sub-inspector of police at Buxar made a search, but nothing was found within the Buxar station yard up to its outer signal and its surroundings on the Baruna side, some date mats were found within a mile of Buxar, and further east and up to two miles east of Baruna some iron bands and outer coverings of bales were found. It may be added that certain contents of other bales were recovered from a village two or three miles from Buxar and from another village about 20 miles therefrom. No one has been convicted of the robbery or theft, but seven villagers, among whom there was no railway servant, have been convicted of receiving stolen property.

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It thus appears that all the goods recovered were found between Buxar and Arrah, at which stations there was a duty to check the seals and locks, and the history of the consignment over that section of the railway was all-important. On the evidence, it seems certain that the Ellis patent locks were opened by means of a privately manufactured key, and it seems most likely that the opening of the lock would be done while the train was standing for 39 minutes at Buxar Station; it seems clear enough that most—and perhaps all—of the stolen bales were removed from the wagon while the train was in motion between Buxar and a point probably nearer Baruna than Arrah. Further, it seems almost certain that the thieves must have had information which enabled them to expect and to identify the train and the particular wagon in which this valuable consignment was being carried, and this information would be most easily obtained from railway servants. The thieves must have been prepared for the removal of bales which weighed about 340 lbs. a piece and which would require a large number of men for their removal within a time reasonable for their purpose.

In these circumstances, it was the duty of the respondent, in their Lordships' opinion, to give the evidence of those of the railway servants who were responsible for the care of the consignment at Buxar and Arrah and during the intervening journey. Their Lordships regard the possibility of the interference having occurred so far back as Dildarnagar as so remote that it may be disregarded in the view that they take of the case.

Guard Rohead, an engine-driver and fireman were on No. 132; none of them was made a witness by the respondent. Of those on duty at Buxar during the stop of No. 132, Bhagwan Pathak Harischandra, the assistant stationmaster, and Alamshakhan Abdul Gafur, the railway police constable, who checked one side of the train, gave evidence; Sajatkhan Mahad Safilkhan, who was on duty at Ragnathpura, gave evidence that No. 132 stopped there from 2·2 to 2·22 for watering the engine and cleaning the fire, and that the guard did not leave his brake. There is no witness from Arrah, a seal-checking station, and no explanation as to their absence. The only documentary evidence bearing on this matter is a statement made by Guard Rohead at Dinapore, after the discovery of the theft, which will be referred to later.

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The assistant stationmaster, Buxar, states that No. 132 down train arrived at 0.6 and left at 0.45, and that no wagon was taken out of it at Buxar. There being four lines in the station, the train was on the line next but one to the down platform. He states that, on the arrival of the train, the locks and seals of all the wagons were examined by Guard Rohead and the constable, Alamshakhan, and were found correct; it seems clear that he was relying on their report of their examination. Alamshakhan states that he examined the locks and seals of No. 132 down train, on the down platform side, immediately on the arrival of the train, and found them intact. He states that the offside was checked by the guard, and that the guard wrote the remark certifying all correct in the seal-checking book, the entry being also signed by him. That book remains in the police-station, but is preserved for one year only. It is clear that 39 minutes was beyond the time usual for locomotive requirements, and it is stated by some of the witnesses that the guard usually checks the platform side; these points might have been cleared up by the evidence of the guard, in addition to the evidence of his having in fact made the check, to which he alone could speak.

The statement of Guard Rohead made at Dinapore is not evidence of the correctness of the statements made in it; these should have been proved by Rohead. Further the statements made in it are such as call for explanation. Three of them may be quoted:—

" (7) Where did you last check seals, etc., and find them correct?	Arrah.
(10) Where was the joint Police and Traffic Check last made of the seals of wagons on your train and with what result?	Arrah Passia as correct. At Arrah the Policeman must have mistaken it for a non-seal wagon as there were a number on the train loaded with stone. The side I checked was correct.
(15) Further remarks which you consider might help the Police in obtaining a clue to the theft.	As I thoroughly checked all seals at BXR this wagon was tampered with either at BXR after checking or at Ara when shunted on the up line for 6 Dn.".

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As already stated, no witness was called who could speak as to what happened at Arrah, where the train stopped for over an hour; there is no explanation as to the absence of the policeman who is alleged in the above statement to have checked the offside of the train.

In the opinion of their Lordships, the absence of Rohead is a serious matter, and it is necessary to refer to various steps in the proceedings which related to Rohead. But first it may be noted that Rohead's statement was not produced until the 10th January, 1928. The trial began on the 29th November, 1927, when it was adjourned; it was resumed on the 10th January, 1928, and the rest of the defendants' evidence was taken on the 11th, 12th, 13th, 16th, 17th, 18th and 19th January.

On the 21st April, 1927, the defendants applied for a commission to Patna to examine seven named persons as witnesses, who were stated to reside at a distance of about 1,300 miles. The application was opposed and was refused on the ground that these persons were all then in the service of the defendants, who were in a position to compel their attendance in Court without any great cost. Five of these persons were among the defendants' witnesses at the trial. A sixth was Sital Prasad Singh, seal checker at Dinapore, whose absence from the trial was accounted for by illness. The seventh was Guard Rohead.

On the 10th December, 1927, the plaintiffs proposed interrogatories to be answered by the defendant, of which No. 3 was:—"What is the standing of Guard J. Rohead who you say conducted 132 down on 21st April, 1925, from Moghal Serai to Buxar? Is he in your service now. If not, when did he retire or resign? State the cause of his retirement or resignation if any." This application was opposed and was refused on the same day by the Court on the ground that it was too late, as the trial had already started.

In response to a request by the plaintiffs, probably as the result of the above refusal, for information as to the whereabouts of Guard Rohead, the defendant on the 15th December replied that the information could not be supplied. The plaintiffs wrote again on the 24th December, and, on the 3rd January, 1928, the defendant replied as follows:—"I regret I am unable to disclose the address of the above named

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(Guard J. Rohead) who is at present on leave preparatory to retirement. However, I will be prepared to forward any communication from you to him at the address given me."

On the 10th January, 1928, when the trial was resumed, the defendant filed an affidavit, giving answers to the interrogatories which had been refused on the 10th December, 1927, and, in answer to No. 3, stated, "Guard J. Rohead joined railway service in 1902. He is now on furlough prior to retirement from 14th December, 1927. He retired under age limit."

On the 19th January, 1928, on the conclusion of the evidence of their last witness, the defendants made an application, which was opposed by the plaintiffs and was rejected by the Trial Judge as follows:—

The defendants submit that:—

1. That the defendants are prepared to examine in addition to the witnesses already examined, any other witnesses whom the plaintiffs want the railways to examine in order to show how the consignment was dealt with while in possession of the railways provided the Honourable Court deems it necessary to do so.

Plaintiffs be therefore called upon to state whether they want any witness to be examined by the railways regarding the dealing of the consignment.

19-1-28.

J. G. Mody.

21-1-28.

Defendants have already submitted to Court on 19th January, 1928, that they have closed their case; This application does not lie in face of the fact that the defendants have to lead evidence as to how the consignments has been dealt with and they have to satisfy their requirements of law. They have not chosen to examine the persons who conducted and guarded 132 Dn. and also other persons on this train and other important witnesses on their behalf nor have they tendered them for cross-examination in spite of over-repeated applications. Thereafter it will be for the Court to see whether the defendants have led the whole evidence satisfactory for the requirements under law and to make adverse inferences against the defendants if they have chosen not to examine such important witnesses before they close their case. This application is therefore made by the other side under the pretence of showing the *bona fides* which they have not shown. Under the circumstances such an application is not legal and maintainable.

B. B. MODI,
Vakil.

The plaintiffs cannot be called upon now to state if any other witnesses are necessary to be examined by defendants for the purpose in question. The defendants have already closed their case and they themselves are the best judges as to what evidence they are bound to lead to satisfy the Court on the question in hand. Application filed.

21-1-28.

P. C. DESAI,
Sub-Judge.

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The learned Judge appears to have confused the two distinct questions at this stage, to which their Lordships have already referred. It must have been obvious to the defendants that Rohead was an essential witness as to the dealing with the consignment, and they are here clearly informed—and not for the first time—that the plaintiffs so regarded him. Not only was he essential to the proof of his statement at Dinapore, but he should have been submitted for cross-examination. The defendants' application for a commission over seven months before the trial of one of their own servants, was unreasonable and was rightly refused; apart from any other reason, the plaintiffs were entitled to claim that the evidence of such an important witness should be given at the trial. The ultimate absence of the witness from the trial was never adequately explained, for the attempt to get a commission to examine Rohead after the evidence of both sides had been closed merely throws into contrast their previous attitude, and suggest that they were trying to put a better appearance on their previous default. If that application had been made in December or early in January, it might then have at least shown their readiness to make Rohead's evidence available.

While their Lordships would be inclined to hold that the respondent, by his failure to submit the evidence of Rohead, was in breach of his contractual obligation to give the evidence necessary for disclosure of how the consignment was dealt with, they are clearly of opinion that the failure to submit the evidence of Rohead, in the circumstances of this case, entitles the Court to presume, in terms of S. 114 (*g*) of the Evidence Act, that Rohead's evidence, if produced, would be unfavourable to the respondent, and that, in consequence, misconduct by complicity in the theft of some servant or servants of the respondent may be fairly inferred from the respondent's evidence. It is unnecessary to refer to the appellants' other contentions, but, except as to the unexplained absence of the policeman, who is said by Rohead to have checked the offside of the train at Arrah, their Lordships were not seriously impressed by the appellants' criticisms as to the non-production of witnesses by the respondent, including Devraj, Vira and others.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, that the judgment and

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decree of the High Court should be set aside and that the decree of the Subordinate Judge should be restored, the appellants to have the costs of this appeal and their costs in the High Court.

Solicitors for Appellants: *Lattey & Dawe.*

Solicitors for Respondent: *Solicitor, India Office.*

R. C. C. — *Appeal allowed.*

B. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE VENKATARAMANA RAO.

C. V. C. T. V. Venkatachalam Chettiar .. *Petitioner**

v.

V. Vr. N. Ar. Nagappa Chettiar and others .. *Respondents.*

Venkatachalam Chettiar *v.* Nagappa Chettiar.

Certiorari—Rules for the conduct of elections of members to Local Board, r. 35 (2)—Interruption at one of the polling booths—Stay of election by order of Government—Enquiry by Government and order of fresh poll at all booths—Petition to Election Commissioner—Decision of Election Commissioner declaring the order of Government illegal and election of respondent good—Whether Election Commissioner acted within his jurisdiction—Government orders final in the circumstances.

Where an election which was fixed for the 23rd November, 1936, was stopped at one of the fourteen polling booths by the polling officer under r. 24-B (1) of the Election Rules and on reference by the election authority to the Government on this matter, the Government passed orders on the 3rd December for the holding of a fresh poll at *all* the polling booths, stating it to be their conclusion *after inquiry* that there had been systematic interruption of the polling at all the booths and 14th December was fixed for election again and the petitioner was declared duly elected in the election so held, and on a petition to declare the election of the 14th December void by the defeated candidate (respondent) to the Election Commissioner not on the ground that there was anything wrong in the actual conduct of elections on the 14th but solely on the ground that the Government could not have ordered the fresh elections, and the Commissioner having held that the order of Government was *ultra vires* and the election of the 14th December void, except with regard to the one place where polling had been stopped, and that the number of votes in the other 13 booths went to declare the respondent elected.

Held, (1) the Election Commissioner can have jurisdiction only if the order of the Government is either *ultra vires* the rules or *mala fide*.

(2) That since the sub-section (2) to r. 35 contemplated (*a*) that the Government may hold an enquiry, (*b*) that they may hold it at any time before the results are declared, and (*c*) that they may pass final orders on their enquiry, the orders of the Government after such enquiry could not be questioned.

(3) It would be contrary to the law of interference on revision for the election Court to decide whether the Government was justified or not on the facts when the Government had power to order fresh elections.

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* C. M. P. No. 1745 of 1937. 13th July, 1937.

(4) Since the election Court had acted without jurisdiction in setting aside the election of the petitioner and declaring respondent elected the High Court would be justified to issue a writ of *certiorari* to quash the election proceedings.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling upon the Election Commissioner, Madura, the second respondent herein to submit to the High Court all the records relating to O.P. No. 63 of 1936 and I.A. Nos. 10, 114 and 246 of 1937 in the said O.P. No. 63 of 1936 on his file and to quash the orders dated 1st March, 1937 and 10th April, 1937, respectively, passed by the second respondent in the said O.P. No. 63 of 1936.

B. Sitarama Rao and *K. Subba Rao* for Petitioner.

T. R. Venkatarama Sastri, K. S. Sankara Aiyar and *Government Pleader* for Respondents.

The Court made the following

ORDER.—This matter relates to the election of a member to the District Board of Ramnad for the Pallathur Circle. The election was first fixed for the 23rd November, 1936. On that date the poll at one of the fourteen polling booths was stopped by the polling officer under r. 24-B (1) of the Election Rules. The Election Authority on being notified of this, referred the matter for the orders of Government. Government passed orders on the 3rd December for the holding of a fresh poll at *all* the polling booths, stating it to be their conclusion after enquiry that there had been systematic interruption of the polling at *all* the polling stations. The date for this fresh poll was fixed by the Election Authority as 14th December. On that day polling proceeded normally, and in due course Mr. Venkatachalam Chettiar (the present petitioner) was declared elected. The defeated candidate Mr. Nagappa Chettiar (the present respondent) thereupon filed a petition before the Election Commissioner (principal Subordinate Judge, Madura) who held that the order of Government was *ultra vires,* and the election of the 14th December therefore void except in so far as it concerned the one polling-booth where polling had been stopped in November. The Election Commissioner further ordered that the votes cast in the other thirteen booths in November should be counted, and on the result ascertained by this count and by the polling in the one booth in December,

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he declared Mr. Nagappa Chettiar to be elected. Thereupon Mr. Venkatachalam Chettiar moved this Court to issue a writ of *certiorari.*

The question for our decision is whether the Election Commissioner had any jurisdiction to pass the orders which he has passed. It is clear that Mr. Nagappa Chettiar had no complaint to make with regard to the actual conduct of the election on the 14th. He attacked it solely on the ground that it ought never to have been ordered. The Election Commissioner therefore can have jurisdiction only if the order of the Government is either *ultra vires* of the election rules or *mala fide.*

That the Government's order was *ultra vires,* it seems to us to be impossible to maintain. It was passed under r. 35. Sub-section (2) of the rule, omitting unnecessary words, runs as follows:—

> "Pending . . . . the issue of final orders on any enquiry which the local Government may institute upon receipt of information that an election is being . . . . held in contravention of the rules, it shall be lawful for the Local Government to direct the stay of the election proceedings at any stage thereof prior to the declaration of the results."

This sub-section obviously contemplates the following:—

(*i*) Government may hold an enquiry;
(*ii*) They may hold it at any time before the results are declared; and
(*iii*) They may pass final orders on their enquiry.

In the present case the Government state that they have held an enquiry, they did hold it before the results were declared, and they have passed final orders. We are unable to see how these orders can be questioned on the ground that Government had no power to pass them.

It was argued by Mr. Venkatarama Sastri for the respondent here that when once votes have been cast into the ballot box and the hours of polling are over the jurisdiction of Government ends and the jurisdiction of the Election Commissioner begins. But this argument overlooks the clear statement of r. 35 (2) that "Election proceedings" continue and may be stayed by Government at any time before the results are declared —and of course, the rules for the enquiry by the Election Commissioners into election petitions show clearly enough that until results have been declared there is nothing for an Election Commissioner to enquire about. We repeat therefore that

Government were within their rights in passing the order of 3rd December. Venkatachalam Chettiar *v.* Nagappa Chettiar.

Mr. Venkatarama Sastri then proceeds to argue that even if Government had the power to order a fresh election the Election Court can come to its own conclusion whether the order was justified or not justified on the facts. But this view is contrary to the law of interference on revision and we are unable to accept it. As stated already respondent must now fail, unless he can show that Government's order was passed *mala fide*: On this point though Government's order is referred to and attacked on the ground of illegality in the petition to the Election Commissioner, there is no positive assertion whatever. We find accordingly that as Government's order was not *ultra vires,* and was not asserted to be *mala fide* it was beyond the jurisdiction of the Election Court to consider it on its merits. The Election Court has therefore acted without jurisdiction in setting aside the election of the petitioner on the 14th December, and in declaring the respondent elected, and we must quash its orders. First respondent must pay petitioner's costs. Vakils fee Rs. 150.

K. C. —— *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE VENKATARAMANA RAO.

Nagarur Sambayya ... *Appellant* (Plaintiff)*

v.

Nagarur Pedda Subbayya .. *Respondent (Defendant).*

Sambayya *v.* Pedda Subbayya.

Provincial Insolvency Act (V of 1920), Ss. 28 (2), 29, 78 (2)—Petition by creditors to declare debtor insolvent—Adjudication and annulment subsequently—To save bar of limitation whether the period from date of presentation of application up to annulment could be computed—Acknowledgment whether would save limitation.

The plaintiff got executed in his favour two promissory notes by the defendant on 7th May, 1922. Subsequently the creditors presented a petition in insolvency on 7th November, 1922, to adjudicate the defendant an insolvent. The order of adjudication was passed on 21st March, 1923. The adjudication was annulled on 5th April, 1928. The present suit by plaintiff on his two pro-notes was filed on 23rd October, 1930. The plaintiff sought to escape bar of limitation by alleging that he was entitled to exclude the whole period during which the proceedings in insolvency were pending, that is, from

* App. Nos. 449 and 450 of 1931. 13th August, 1937.

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7th November, 1922, the date of the presentation of the insolvency petition, to 5th April, 1928, the date of annulment, because it was contended that the date of the order of adjudication in S. 78, cl. 2 must be deemed to be the date of presentation of the petition on which it is made.

Held, that under S. 78 (2) a creditor was entitled to deduct only the period from the date of adjudication to the date of annulment. The present suit would be therefore barred.

Case-law discussed.

The statute of limitation for the maintenance of an action at law, once it has commenced to run will continue to run in spite of the presentation of the petition in insolvency. If the order of adjudication is made, the operation of the statute of limitation is suspended till the date of the annulment and if the period between that of adjudication and that of annulment is excluded, the statute begins to run immediately on annulment. If no order of adjudication is made, the insolvency does not save the claim from being barred by limitation. So under the law as it stands, a prudent creditor in order to keep his debt alive, will be obliged to file a suit to save it from the bar of limitation in spite of insolvency.

In a connected case where but for an acknowledgment relied on the suit would be obviously barred by limitation in the above view taken, the question was whether the acknowledgment on the said date would not save the bar of limitation,

Held, that under S. 19 of the Limitation Act where before the expiration of the period prescribed for a suit an acknowledgment of liability was made, a fresh period of limitation should be computed from the date of acknowledgment,

The word 'prescribed' in S. 19 of the Limitation Act is not limited to the period in the first schedule of the Act; in computing the period prescribed, the period which a party is entitled to exclude under any law for the time being in force should be taken into account.

Maqbal Ahmad v. *Pratap Narain Singh*, (1935) 68 M.L.J. 665: L.R. 62 I.A. 80: I.L.R. 57 All. 242 (P.C.), relied on.

Appeal against the decree of the District Court of Cuddappah dated 31st December, 1930, in O. S. Nos. 18 of 1930 and 29 of 1929 respectively.

B. Sitarama Rao and *C. V. Subramaniam* for Appellant.

B. Somayya and *Kasturi Seshagiri Rao* for Respondent.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—This appeal raises a question of limitation. The suit was to recover a sum of money due in respect of two promissory notes dated 7th May, 1922, executed by the defendant in favour of the plaintiff. Subsequent to the execution of the promissory notes, the creditors, presented a petition in insolvency on 7th November, 1922, to adjudicate the defendant an insolvent. The order of adjudication was passed on 21st March, 1923. The adjudication order was annulled on 5th April, 1928. The suit was instituted on 23rd

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October, 1930. The plaintiff seeks to escape the bar of limitation by alleging that he is entitled to exclude the whole period during which the proceedings in insolvency were pending, that is, from 7th November, 1922, the date of the presentation of the insolvency petition to 5th April, 1928, the date of annulment. The contention of the defendant is that the plaintiff is entitled to exclude only the period from the date of the order of adjudication, namely, 21st March, 1923, to 5th April, 1928, the date of annulment. The learned District Judge has given effect to the contention of the defendant and hence this appeal is preferred by the plaintiff.

The question is, is this view right? The relevant provision bearing on the question is S. 78, cl. (2) of the Provincial Insolvency Act which runs thus:

"Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-S. (2) of S. 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded."

Unfettered by authority according to the plain terms of the section, the period of exclusion is that from the date of the order of adjudication to the date of the order of annulment. But it is contended that the date of the order of adjudication in S. 78, cl. (2) must be deemed to be the date of the presentation of the petition and reliance is placed on S. 28, cl. (7) of the Provincial Insolvency Act, which provides that:

"An order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made."

The contention is outlined thus. S. 28, cl. (7) is a general section relating to 'adjudication and the consequences of adjudication' and must govern the interpretation of the expression 'the order of adjudication' wherever it occurs in the Act. This contention seems to be untenable on an examination of the principle underlying that provision and other sections of the Act, where the expression 'order of adjudication occurs'. S. 28, cl. (7) only enunciates the well-known doctrine of relation back in insolvency law. The principle underlying that doctrine is that the adjudication has relation to the act of bankruptcy and the property vests by relation from that time in the trustee in bankruptcy, that is, the title of the trustee in bankruptcy or receiver relates to the commencement of the insolvency. This

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is the English rule. Under the English law, the insolvency commences either on the date of the presentation of the petition, or from the earliest act of insolvency committed within three months before the date of the presentation of the petition and the title of the trustee in bankruptcy relates to that date. It is also the law under the Presidency Towns Insolvency Act. Under S. 28, cl. (7) of the Provincial Insolvency Act, the insolvency commences from the date of the presentation of the petition. We do not think that a different rule from the English law and that laid down in the Presidency Towns Insolvency Act was intended to be laid down in regard to the legal consequences flowing from the doctrine of relation back. The only difference as pointed out by Mulla (p. 413) is as to the point of time when the insolvency commences. The whole of S. 28 deals with the property of the insolvent and the order of adjudication relates back and takes effect from the date of the presentation of the petition, vesting the property of the insolvent in the official receiver as from that date. As explained in In re *Pollitt*[1]:

> "The result of the relation back is that all the subsequent dealings with debtor's property must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed."

Vide *Kalianji* v. *The Bank of Madras*[2], wherein In re *Pollitt*[1] is cited with approval. And the same view is expressed in *Rangiah* v. *Appaji Rao*[3]—a case on which strong reliance was placed by the appellant—where the learned Judges observe at p. 302 of *Rangiah* v. *Appaji Rao*[3] that:

> "S. 28, cl. (7) is a general clause which applies to all dealings by or with the insolvent, unless any particular dealing is expressly exempted from its operation."

The question now under consideration has nothing to do with any dealing by or with the insolvent but it relates to the maintainability of the action on a debt due by him in a Court of law. The relevant provisions which deal with the effect of the insolvency on the maintainability of actions are Ss. 28, 29 and 78. It will be seen from these three sections that the material date is the date of the order of adjudication. The insolvency does not *per se* bar the maintenance of an action. Before the date of the adjudication the action is maintainable without

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1. (1893) 1 Q.B. 455.
2. (1915) 29 M.L.J. 788: I.L.R. 39 Mad. 693 at 699.
3. (1926) 51 M.L.J. 719: I.L.R. 50 Mad. 300.

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the leave of the Insolvency Court but thereafter, that is, after the date of the order of adjudication, the action is not maintainable without leave. If an action has been commenced before the date of the order of adjudication, the moment the order of adjudication is passed, the Court before which the suit is pending can either stay or continue it. The statute of limitation for the maintenance of an action at law, once it has commenced to run, will continue to run in spite of the presentation of the petition in insolvency. If the order of adjudication is made, the operation of the statute of limitation is suspended till the date of the annulment and if the adjudication is annulled, the period between the date of the adjudication and that of annulment is excluded and the statute begins to run immediately on annulment. If no order of adjudication is made, the insolvency does not save the claim from being barred by limitation. So, under the law as it stands, a prudent creditor in order to keep his debt alive, will be obliged to file a suit to save it from the bar of limitation in spite of insolvency. No doubt, it may in a sense be futile, if an order of adjudication takes place; but he runs the risk of losing the claim altogether if no adjudication is made. If the presentation of an insolvency petition *per se* laid the creditor under a disability, of course, it may stand to reason that the time occupied by the pendency of the insolvency, that is, commencing from the date of the petition should be excluded; but since the creditor is placed under no such disability, the legislature has provided that the period during which he is under a disability should be excluded. Considerable reliance was placed on the decision in *Atchuta Ramayya Garu* v. *Official Receiver, East Godavary*[1]. It was no doubt held in that case that a suit filed and a decree obtained therein after the date of presentation of the insolvency petition and before the date of adjudication were held to be incompetent because the leave of the Insolvency Court had not been obtained before the commencement of the suit. With respect, we are unable to follow this decision. If a suit can be filed by a creditor without leave before the date of the order of adjudication and the Court before which it is filed has jurisdiction to entertain it and pass a decree thereon, it is difficult to understand how an order passed *ex post facto* by another Court could

1. (1935) 69 M.L.J. 241: I.L.R. 58 Mad. 1032.

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render such a suit incompetent and the decree passed therein void. The learned Judges have not given due weight to the word 'thereafter' in S. 28, cl. (2) and to the provisions of S. 29 of the Act which clearly apply to a state of affairs which occurred in the case with which they were dealing. Under S. 29, it was competent to the Court to pass an appropriate order and it was not necessary to pronounce the suit to be incompetent or the decree void. It seems to us that to apply the doctrine of relation back to a suit instituted before an order of adjudication is against the plain language of S. 28, cl. (2). The view expressed by Ramesam, J., in *Kaliaperumal Naicker* v. *Ramachandra Aiyar*[1] seems to be sound, namely, "once the order (adjudication) is made, the effect created by it is, by a legal fiction, taken to relate back to the presentation of the petition or in other words the commencement of the insolvency. For all purposes of the Insolvency Act, this fiction has to be used and it is a very useful fiction; but outside those purposes, it has no place. The filing of a suit prior to the adjudication may be regarded as being outside these purposes with reference to the provisions of S. 28, cl. (2)." The result of the decision in *Atchuta Ramayya Garu* v. *Official Receiver, East Godavary*,[2] is that if a creditor files a suit without obtaining leave of the Insolvency Court before the date of the order of adjudication, his suit is incompetent; but if he does not file a suit and no order of adjudication is made, he may find his claim barred. We do not think that such a state of affairs was contemplated by the legislature in enacting S. 28, cl. (7), and we are therefore unable to adopt the interpretation placed by the learned Judges in *Atchuta Ramayya Garu* v. *Official Receiver, East Godavary*[2]. Again an examination of several other sections of the Act does not lead to the conclusion that wherever the date of the order of adjudication occurs it must mean the date of the presentation of the petition. The legislature has kept in view the distinction between these two dates. For example, *see* Ss. 30, 74, cl. (5) and proviso to S. 55 where the contrast between the two dates is clearly brought out.

There is no direct decision on the point with which we are now dealing but our attention has been drawn to certain observations in two reported cases, namely, *Machanjeeri Ahmed*

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1. (1927) 53 M.L.J. 142.
2. (1935) 69 M.L.J. 241: I.L.R. 58 Mad. 1032.

v. *Govinda Prabhu*[1] and *Bandeally Jaffer* v. *Peer Mohamed*[2]. In both these cases, the question was whether a creditor is entitled to rely on S. 78 (2) in regard to a suit filed while the insolvency proceedings were pending and there was no annulment of adjudication. The learned Judges in both the cases rightly held that S. 78 (2) would not apply. In *Machanjeeri Ahmed* v. *Govinda Prabhu*[1], there is an observation to the following effect:

> "If the order of adjudication is annulled, the right to proceed against the insolvent would revive and the period during which the insolvency proceedings were pending would be excluded if the person wishes to proceed against the insolvent or his property".

We do not think that the learned Judges meant having regard to the context that the insolvency proceedings would include for the purpose of exclusion under S. 78 (2) the period between the date of the presentation and the date of adjudication. In *Bandeally Jaffer* v. *Peer Mohamed*[2] no doubt there are observations to the effect that the whole of the proceedings commencing from the date of the presentation of the petition would be excluded; but the observations are entirely *obiter* and are not necessary for the decision of that case.

Again, considerable reliance was placed on a recent decision reported in *Subramania Aiyar* v. *Meenakshisundaram Chettiar*[3] where, it was held that even though a debt is barred before the date of adjudication it can be proved in insolvency under S. 34 (2). It seems to us that it is unnecessary to examine the correctness of the decision for the purpose of this case; probably that decision may be explainable upon the principle that once the order of adjudication is made, the administration of the insolvent's estate is under the supervision of the bankruptcy Court and all the property is vested or must be deemed to have vested in the trustee in bankruptcy from the date of the presentation of the petition by the doctrine of relation back and the trustee in bankruptcy is deemed to be a trustee for the creditors who cannot plead the statute of limitation against the creditors for whose benefit he is administering the estate. This seems to derive support from the decision in Ex parte *Ross*[4] cited with approval in In re

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1. (1928) 55 M.L.J. 661: I.L.R. 51 Mad. 862.
2. A.I.R. 1933 Rang. 75.
3. (1937) 1 M.L.J. 637.
4. (1802) 2 G. and J. Bank. Cases 46 and 330.

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Benzon: *Bower* v. *Chetwynd*[1], where Channel, J., observed thus:

"*Ex parte* Ross shows that in the bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy, and of this, there can be no doubt, but this is only in the bankruptcy".

The proof in bankruptcy is one thing and the maintainability of an action in a Court of law is another. However, as we have stated, we think it unnecessary to express an opinion in regard to the construction of S. 34 as the debt in the present case was not barred on the date of the adjudication.

We therefore hold that under S. 78 (2) a creditor is entitled to deduct only the period from the date of adjudication to the date of annulment. The decision of the lower Court is therefore correct and we accordingly dismiss the appeal with costs.

A. S. No. 450 of 1931.—This appeal also raises the same question of limitation, but the facts are slightly different. The material dates are as follows:—

The date of the pronote.	8—1—1920
The date of the presentation of the petition in insolvency ...	7—11—1922
The date of adjudication.	21—3—1923
The date of the annulment of adjudication ...	5—4—1928
Acknowledgment of the debt ...	6—6—1927
The date of the filing of the suit ...	23—9—1929

But for the acknowledgment relied on, the suit would be obviously barred by limitation in the view we have taken in the connected appeal No. 449 of 1931. The question is whether the acknowledgment on the said date would not save the bar of limitation. The learned District Judge has held that the acknowledgment relied on cannot have the effect of extending the time on the ground that it was made after the period of limitation had expired. It seems to us that this view is wrong. Under S. 19 of the Limitation Act where before the expiration of the period prescribed for a suit an acknowledgment of liability is made, a fresh period of limitation shall be computed

1. (1914) 2 Ch. 68.

from the date of the acknowledgment. The word 'prescribed' in S. 19 of the Limitation Act is not limited to the period in the first schedule of the Act; in computing the period prescribed the period which a party is entitled to exclude under any law for the time being in force should be taken into account. This is clear from the recent decision of the Privy Council in *Maqbal Ahmad* v. *Pratap Narain Singh*[1], where their Lordships observe thus:

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"In order to ascertain what is the date of the expiration of the prescribed period, the days excluded from operating by way of limitation have to be added to what is primarily the prescribed period."

If this principle is given effect to, there can be no question that the acknowledgment in the present suit was made before the expiration of the prescribed period. The suit is therefore in time.

We therefore reverse the decision of the learned District Judge and pass a decree in favour of the plaintiff for the amount claimed with interest at six per cent. from the date of the plaint with costs here and in the Court below.

K. C. ——— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD MACMILLAN, LORD ALNESS, LORD MAUGHAM, SIR SHADI LAL AND SIR GEORGE RANKIN.

Lal Harihar Pratap Bakhsh Singh and another .. *Appellants**

v.

Thakur Bajrang Bahadur Singh and another .. *Respondents.*

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Lal Harihar Pratap Bakhsh Singh *v.* Thakur Bajrang Bahadur Singh.

Hindu Law—Succession—"Male agnate"—Meaning of—Proof of blood relationship—Effect of adoption—Burden of proof regarding adoption—Oudh Estates Act, 1869, S. 22 (10)—Rule of succession under.

According to the rules of the Mitakshara 'male agnate' denotes a 'gotraja sapinda', that is, a blood relation belonging to the same gotra. Blood relations or sapindas may be related either through males or through females. *Prima facie* sapindas who are related through an unbroken line of male descent are gotraja sapindas for by virtue of such unbroken relationship they must be of the same gotra. The two conditions laid down by the Board in *Dulahin Jadunath Kuar* v. *Raja Bisheshar Bakhsh Singh*, (1932) 63 M.L.J. 287: L.R. 59 I.A. 173 at 190 (P.C.), which should be satisfied by a person claiming

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1. (1935) 68 M.L.J. 665: L.R. 62 I.A. 80: I.L.R. 57 All. 242 (P.C.).

* P. C. Appeal No. 37 of 1936. 31st May, 1937.
Oudh Appeal No. 4 of 1933.

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to be a gotraja sapinda of the propositus are not really independent but inter-related, for the first condition will ordinarily be included in the second.

Adoption does not sever the tie of physical blood relationship but it completely transfers the adopted son to the adoptive family as regards legal relationship. Consequently a son who leaves his own family ceases to be a sapinda of his former relations and *a fortiori* ceases to be a gotraja sapinda of any of them.

Where it is sought to change the usual course of inheritance on the alleged ground of an adoption having been made, it is clearly on the party setting up that title against the entrance of the legal heir to prove the adoption both as regards the power of the adopter to adopt and also as regards the fact of the adoption if it be questioned.

Tarini Charan Chowdhry v. *Saroda Sundari Dasi*, (1869) 3 B.L.R. 145 at 159: 11 W.R. 468 at 474, referred to.

Decision of the Chief Court of Oudh affirmed.

Appeals from a judgment and two decrees of the Chief Court of Oudh varying an original decree of a Judge of that Court.

The facts of the case and the previous history of the litigation appear in the judgment of the Board reported in *Dulahin Jadunath Kuar* v. *Raja Bisheshar Bakhsh Singh*[1].

A. M. Dunne and *J. M. Parikh* for Appellants.

L. DeGruyther and *W. Wallach* for Respondents.

31st May, 1937. Their Lordships' judgment was delivered by

Lord Macmillan.

LORD MACMILLAN.—The previous history of this litigation is set out in the judgments of the Board delivered in 1930 and 1932 and reported in *Dulahin Jadunath Kuar* v. *Raja Bisheshar Bakhsh Singh*[1]. The original plaintiff, Raja Bisheshar Bakhsh Singh, who has since died, claimed to be entitled to the taluqa of Gangwal in succession to Raja Suraj Prakash Singh, the last male holder, who died in 1899. The present respondents are the two sons of the original plaintiff and as his legal representatives have taken his place as plaintiffs in the suit.

When the case was formerly before the Board the ground was cleared of various questions which are consequently no longer in controversy. The sole remaining question, which was then formulated but not decided, was remitted to the Chief Court of Oudh and the present appeal is from the judgment of that Court pronounced in conformity with their finding on the question remitted to them.

By the previous judgments of the Board it has been decided in law that the succession to the taluqa is governed by

1. (1932) 63 M.L.J. 287: L.R. 59 I.A. 173 at 190 (P.C.).

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the Oudh Estates Act of 1869 and in particular by S. 22 (10), which, as amended in 1910, devolves the succession on "the nearest male agnate according to the rule of lineal primogeniture"; that the expression "male agnate," as here used, is to be construed according to "the ordinary law which would govern the succession apart from the statute—in this case the Hindu law of succession according to the rules of the Mitakshara"; and that according to this law "'male agnate' denotes a 'gotraja sapinda'," that is, a blood relation belonging to the same gotra—a word the significance of which is explained in the judgment of the Board delivered by Sir Robert Phillimore in *Bhyah Ram Singh* v. *Bhyah Ugur Singh*[1] and quoted in the previous report of the present case at pp. 189-190 of 59 I.A. Blood relations or sapindas may be related either through males or through females. *Prima facie* sapindas who are related through an unbroken line of male descent are gotraja sapindas for by virtue of such unbroken relationship they must be of the same gotra. It will thus be seen that the two conditions which it is stated in the previous judgment of the Board (at p. 190 of 59 I.A.) must be satisfied by a person claiming to be a gotraja sapinda of the propositus are not really independent but inter-related, for the first condition will ordinarily be included in the second.

According to the judgment of the Board of 4th December, 1930, the original plaintiff "must be held to have established that, in blood relationship, he is the nearest male blood relation according to the rule of lineal primogeniture of Raja Suraj, the last male holder of the taluqa." In the ordinary case this finding in fact would have ended the case, for, unless effectively challenged in some way, the finding of such physical relationship inevitably leads to a finding in law that the claimant is entitled to succeed as the nearest gotraja sapinda of the deceased.

But the Board was confronted with an unusual state of matters. Blood relationship through the male line having been found to exist between the claimant and the propositus, identity of gotra as between them was naturally to be expected. But at the trial the plaintiff stated quite definitely that his gotra was Atri while there was evidence for the defence that the

1. (1870) 13 Moo. I.A. 373 at 390.

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gotra of the propositus was Vaiyaghra. "It was ultimately agreed by both parties," as recorded in the judgment of the Board of 8th March, 1932, "(*a*) that if in fact the propositus was of the Vaiyaghra gotra and the plaintiff was of the Atri gotra this difference of gotra necessarily led to the conclusion that the plaintiff is not an agnate, that is, gotraja sapinda, of the propositus, and (*b*) that such difference of gotra could only be accounted for by adoption into a different gotra of the plaintiff or one of his paternal ancestors since the common ancestor Bhaya Partap Singh." The parties thus recognised that the claimant and the propositus having been proved to be both descended in the male line from a common male ancestor their gotras must be identical unless the line of descent could be shown to have been broken, and that the only way in which it could have been broken in the circumstances of this case was by adoption. Adoption does not sever the tie of physical blood relationship but it completely transfers the adopted son to the adoptive family as regards legal relationship. Consequently a son who leaves his own family and enters by adoption into a different family ceases to be a sapinda of his former relations and *a fortiori* ceases to be a gotraja sapinda of any of them.

Now this apparent discrepancy between the gotra of the claimant and the gotra of the propositus which had emerged in the course of the proceedings had never been fully explored. No such question was raised in the pleadings nor was the matter clearly or adequately placed before either of the lower Courts. In these circumstances, on the advice of the Board, His Majesty in Council was pleased on 17th March, 1932, to order that the case "be remitted to the Chief Court of Oudh in order that the plaintiff may have the opportunity of establishing the identity of his gotra with that of Raja Suraj Prakash Singh, because upon this issue his success or failure in his claim to the taluqa will now depend."

The learned Judges of the Chief Court of Oudh, in addressing themselves to the question remitted to them, preface their judgment, which is now under review, with a rehearsal of the legal position as they conceived it to be. They were apparently apprehensive, in view of the arguments submitted to them, that certain expressions in the judgment of the Board might be read as effecting some change in the accepted law and

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they were therefore concerned to show that the judgment rightly read had no such effect. They accurately point out that "in the proof of descent from one common male stock and through males is implicit the identity of gotra or the community of family"—a proposition all the more important by reason of the difficulty of expressing the Hindu "gotra" by such words as "family," "paternal stock," or "patriarchal stock." Indeed all that had been decided by the Board was that, identity of gotra being in this case challenged by evidence inconsistent with such identity, it was necessary for the claimant to prove "that the continuity of the line of descent from the common ancestor downwards is not broken by an adoption of any person in the plaintiff's line into another gotra or family."

In the general case where it is sought to change the usual course of inheritance on the alleged ground of an adoption having been made "it is clearly upon the party setting up that title against the entrance of the legal heir to prove the adoption both as regards the power of the adopter to adopt and also as regards the fact of the adoption if it be questioned" (*Tarini Charan Chowdhry* v. *Saroda Sundari Dasi*[1]). In the present case the situation was quite unusual. No issue had been raised as to a possible break in the line of succession by an intervening adoption; the defendants had made no allegation of any adoption but sought to negative the plaintiff's claim by establishing that one of his alleged ancestors in the male line had died childless; the matter of the respective gotras of the plaintiff and the propositus arose quite incidentally. When the case was last before the Board the plaintiff, who was propounding his title to succeed, was found to have asserted, as already stated, that he belonged to the Atri gotra, while for the defence it was maintained that the evidence established that the gotra of the propositus was Vaiyaghra. This discrepancy obviously had to be cleared up and it was in these circumstances that the remit was made for further inquiry. It was not intended to suggest that there was a general duty to prove a subsisting title or to negative the suggestion of adoption into another gotra.

The learned Judges of the Chief Court, having before them the recorded agreement of parties that the alleged

1. (1869) 3 B.L.R. 145 at 159: 11 W.R. 468 at 474.

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"difference of gotra could only be accounted for by adoption into a different gotra of the plaintiff or one of his paternal ancestors since the common ancestor Bhaya Partap Singh," very properly deal fully with the question whether there had been any such adoption, as the only suggested obstacle in the way of the establishment of the identity of the plaintiff's gotra with that of the propositus. The defendant was unable to give particulars of any adoption but merely asserted that, the gotras being different, there must have been an adoption. The Chief Court, however, investigated the whole matter carefully in the light of the evidence led and reached the conclusion "that neither Jugraj nor any of the ancestors of the plaintiff in the line of descent from Jugraj was ever adopted." They then proceed to state that "the result of this finding is that the plaintiff's gotra is the same as that of Raja Suraj Prakash Singh." This must obviously be so if the only possible ground of a difference of gotra is disproved.

Having decided that there was no difference of gotra the learned Judges then proceed to examine the evidence as to what was in fact the common gotra of the plaintiff and the propositus. As the result of a detailed analysis of the witnesses' statements they "reject [the defendant's] evidence altogether as partly manufactured and partly unconvincing and find that the gotra of Raja Suraj Prakash Singh was Atri," being the gotra to which the plaintiff claimed to belong. The Chief Court having thus found, on the remit from this Board, that the plaintiff had established the identity of his gotra with that of Raja Suraj Prakash Singh, the last barrier in the way of the plaintiff's success was removed and the Court gave judgment in his favour by dismissing the appeal against the judgment of King, J.

At their Lordships' bar the appellants did not profess themselves able to challenge the findings in fact of the Chief Court either on the question of adoption or on the question of the gotra of Suraj Prakash Singh, but maintained that the Chief Court had misinterpreted the terms of the remit to them, that they had not been directed to try the issue whether there had or had not been an adoption in fact, and that they ought to have confined themselves to the simple question "as to the gotra which was in fact stated and recited on ceremonial occasions in the respective families of the plaintiff and the

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propositus as their gotra." They further complained that the judgment of the Chief Court showed that the learned Judges, in approaching and considering the question of gotra, had been influenced by unsound views of the law applicable. Their Lordships are of opinion that the Chief Court, in their determination of the issue remitted to them, quite rightly dealt with the question of adoption which, by the recorded agreement of parties when they were before this Board, was recognised as vital, and that in dealing with the question of identity of gotra the Chief Court did not misdirect themselves in law. Their Lordships agree with the view of the Chief Court that "the reference in the judgment [of this Board] to the evidence of relatives as to the recitation of gotra at the sradh ceremony is only indicative of the nature of the evidence which may be produced in this case," and was not intended to limit the evidence to this topic.

Their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed, and that the judgment of the Chief Court of Oudh dated 19th December, 1932, be affirmed. The appellants will pay the respondents' costs.

Solicitors for Appellants: *Douglas Grant & Dold.*

Solicitors for Respondents: *Hy. S. L. Polak & Co.*

R. C. C. —— *Appeal dismissed.*

B. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE STODART.

A. P. M. Syed Ibrahim Sahib and Brother (Firm of Merchants carrying on business in brass vessels, Vellore) .. *Appellant** (*Plaintiff*)

v.

V. S. Gurulinga Aiyar .. *Respondent* (*Defendant*).

Firm of Syed Ibrahim Sahib *v.* Gurulinga Aiyar.

Indian Partnership Act (IX of 1932), Ss. 69 and 74—Suit by an unregistered firm—Registration pending suit—If validates the plaint from date of registration—S. 69, if applies to suits on obligations incurred prior to its enactment—Scope and effect of S. 74.

A firm filed a suit on 12th October, 1933, against a debtor to recover moneys due to it on dealings had with him prior to 1st October, 1933, the date when S. 69 of the Indian Partnership Act came into operation. The firm was actually registered on 15th January, 1934, pending suit. No objec-

* S. A. No. 138 of 1936. 1st March, 1937.

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-tion regarding the maintainability of the suit was taken by the defendant till at the stage of argument in March, 1935. No application was either put in by the plaintiff after registration to be allowed to withdraw the suit and file another immediately.

Held, that notwithstanding the fact that the objection was taken late, the suit was not maintainable by reason of S. 69 which is to be interpreted strictly and the suit cannot be treated as valid even from 15th January, 1934, as the plaintiff had not taken steps to regularise the plaint.

Ramakrishna Nadar v. *Ponnayya Thirumalai Vandaya Thevar*, (1935) 69 M.L.J. 791, distinguished.

S. 69 is not confined either by the general law or by S. 74 to suits in respect of obligations incurred after the coming into force of S. 69, that is, 1st October, 1933, but it applies to all suits filed after that date, as the section does not take away any vested rights of parties but only enacts a processual rule by stating that prior to bringing a suit the firm must do a certain act, namely, get itself registered.

Danmal Parshotamdas v. *Baburam Chhotelal*, (1935) I.L.R. 58 All. 495, followed.

Surendranath De v. *Manohar De*, (1934) I.L.R. 62 Cal. 213, also followed in this respect but not followed, in so far as it holds that the 'legal proceedings' in S. 74, cl. (*b*) mean proceedings pending at the commencement of the Act.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in A. S. No. 97 of 1935 preferred against the decree of the Court of the District Munsiff of Vellore in O. S. No. 716 of 1933.

K. S. Krishnaswami Aiyangar for *S. Ramachandra Aiyar* for Appellant.

V. C. Viraraghavachari for Respondent.

The Court delivered the following

JUDGMENT.—The appeal is by the plaintiff. The plaintiff is a firm and the suit was against a debtor of the firm to recover money due on dealings. The suit was filed on 12th October, 1933, that is, it was presented into Court on that day and it was admitted to the file on 20th November, 1933. The Partnership Act IX of 1932 came into force on 1st October, 1932, except S. 69 which came into force according to S. 1 (3) of the Act on 1st October, 1933. And the question for decision in this suit is whether, having regard to the provisions of S. 69 the suit is maintainable. S. 69 (2) is:

> " No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered, and the persons suing are or have been shown in the Register of firms as partners in the firm."

This suit was instituted after 1st October, 1933, and the trial Court and the Court of first appeal have both held that it is not maintainable, because the plaintiff firm was not registered on 12th October, 1933.

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Another point that arises in the suit is this. The plaintiff did actually get itself registered on 15th January, 1934; and it is contended that the lower Courts were wrong in not holding that the suit could be treated as valid as from that date.

Two arguments have been put forward on appeal. The first is that the right to bring a suit without being registered as a firm to recover this debt was a right which had vested before the passing of Act IX of 1932, and so is not affected by the provisions of that Act. That is the argument founded on general principle, and it is also contended that S. 74 of the Act confirms this principle.

The second argument relates to the further point which I have just mentioned, namely, that the lower Courts should have treated the suit as valid as from the date when the firm became registered.

The relevant words of S. 74 are as follows:

"Nothing in this Act shall affect or be deemed to affect—

(*a*) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(*b*) any legal proceeding or remedy in respect of any such right."

Before examining the principal argument in the appeal which is briefly that S. 74 merely enunciates the general principle that new enactments cannot retrospectively affect vested rights unless by express provision in the enactments themselves, I would observe that the legal proceedings indicated in S. 74 (*b*) have been interpreted in some decisions to mean proceedings pending at the commencement of the Act, and it is argued as a preliminary point that that interpretation is not correct. With all respect to the learned Judges who decided those cases, namely, *Surendranath De* v. *Manohar De*[1] and *Firm Krishen Lal* v. *Abdul Ghafur*[2], I must say that I find myself in agreement with the learned Government pleader who appears for the appellants on this point. There appears to be no reason why, if the legislature intended to confine the operation of S. 74 only to suits and proceedings which were pending at the time of the commencement of the Act, they should not have said so in express terms. One finds such provisions in other enactments. On the main point, however, namely, that S. 69 either by the general law or by reason of the operation of S. 74 has no retrospective effect, I find myself unable to agree with the

1. (1934) I.L.R. 62 Cal. 213. 2. A.I.R. 1935 Lah. 893.

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learned Counsel for the appellant. The argument, as I have said is that the firm, prior to the passing of the Act had the right to sue for debt without being registered, that right was a vested right which cannot be taken away by the Act, and therefore since the cause of action accrued before the Act the plaintiff firm can bring exactly the same kind of suit as it could before the Act, that is, without first getting itself registered under Ch. VII of the Act. In my opinion the only right which is affected by S. 69 is a processual right. Before the Act the firm had acquired rights under its contract with defendant. Those rights are not affected or impaired by the passing of the Act. Before the Act the firm could have brought a suit against the defendant to enforce that contract. The right to bring a suit is not impaired by the passing of the Act. So far as I can see the only difference is that prior to bringing the suit the plaintiff firm must now do a certain act, namely, get itself registered in the office of the Registrar of firms, and I think that is a processual matter. Therefore though the general principle relied upon by the learned Government Pleader cannot be gainsaid, and while it cannot be denied that it applies to protect all vested rights from the retrospective effect of new enactments, this, in my opinion, is the exception, namely, when the right relates to procedure in which the litigant has not got a vested right. I cannot, however, omit to set out the argument in its strongest form which has now been put forward on behalf of the appellant, namely, that the right indicated in S. 74 (*a*) is a right of action, and if S. 69 can be construed as affecting the right of action which the plaintiff firm had before the Act that section is nullified by S. 74. I have given that argument my careful consideration and I feel that the right of action in this case is not affected, as such, by S. 69. The plaintiff firm has still got that right, the same right as it had before the Act was passed. What has been altered is the mode in which the firm can enforce that right. Formerly, it had only to file a suit into Court. Now before filing a suit the firm has to get itself registered, and that, as I have said is a matter of alteration in procedure which the law is perfectly competent to effect. This is the view of the section taken in the Allahabad High Court in *Danmal Parshotamdas* v. *Baburam Chhotelal*[1].

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1. (1935) I.L.R. 58 All. 495 at 499.

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My attention has been drawn to several decisions in India in which the general principle has been affirmed. The first of these is *G. Lee Morris, Esquire* v. *Sambamurthi Rayar*[1]. That was a case where the landlord sued to recover arrears of rent. The suit was instituted in April, 1869, and included arrears which were due for 1865-66, before the passing of Act VIII of 1865. The new Act governed the relations between landlord and tenant at the time of the suit, and according to S. 7 of that Act no suit to enforce the terms of a tenancy could be maintained unless pattas and muchilikas had been exchanged. The defendant in the Madras High Court Reports suit contended that so far as rent due for 1865-1866 was concerned the suit was unsustainable, since patta and muchilika had not been exchanged. The fact however was that at the time when the arrears accrued, the Act had not come into force, and it was not necessary in order to enforce the recovery of those arrears that patta and muchilika should have been exchanged; and it was held in that case that S. 7 of the Act had no retrospective effect.

The exchange of patta and muchilika of course had nothing to do with the procedure by which the law was put into motion. The procedure was, as everybody knows, by instituting a suit in the Court of the Collector. The right to recover arrears even though no patta and muchilika had been exchanged was a vested right prior to the passing of the Act. Another important case cited in this connection was *Promatha Nath Pal Chowdhuri* v. *Mohini Mohan Pal Chowdhuri*[2]. That case arose out of a difference between S. 66 of the present Code of Civil Procedure and the corresponding S. 317 of the Code of 1882. The latter barred a suit by the real owner against the benamidar purchaser at Court auction of property sold under a decree, but not against the purchaser's assignees. The new S. 66 barred suit by the real owner against any person claiming title by virtue of the Court auction-purchase. The suit related to a court auction-purchase which was confirmed on 30th July, 1906, but in which the sale certificate was not taken out till 24th April, 1909. The suit was filed after 1909 when the present Code of Civil Procedure had come into force. It was held that the rights of the parties were governed by

1. (1871) 6 M.H.C.R. 122.
2. (1920) I.L.R. 47 Cal. 1108.

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S. 317 of the old Act, in other words, S. 66 of the new Act could not operate to take away the right which had been vested before the commencement of that Act. In this case, therefore the vested right was a substantive right. The new Code took it away absolutely. It was not a case where the new Code merely effected an alteration in the mode of enforcing that right.

In the case of *The Attorney-General* v. *Sillem and others*[1] the principal point for decision was whether the Barons of the Court of Exchequer had the delegated power under S. 26 of 22 and 23 Victoria, Ch. XXI, to extend certain provisions of the Common Law Procedure Act, 1854, to the revenue side of the Court of Exchequer. One of the results of such extension was to create a right of appeal to the Court of Exchequer Chamber from the verdict of the Court of Exchequer. The point was decided in the negative. It was held that the Barons had no such power under the aforesaid section of 22 and 23 Victoria, Ch. XXI. But two of the learned Lords who decided that case held the opposite view, and proceeded to consider the further point whether this alteration in the law could affect pending actions. That point was very pertinent to the case, because, the respondents had obtained a verdict in the Court of Exchequer before the Barons of the Exchequer made the rule aforesaid and claimed that the new rule could not operate retrospectively so as to give appellant the right of appeal. Concerning the question whether the new rules affected pending actions Lord Wensleydale said (page 762 of the report) :

"A question has been presented to our attention, which must be now considered. Was it competent for the Judges of the Exchequer to alter the law as to then pending proceedings, and to enact provisions at the time. . . . . so as to affect the verdict, which the claimant then had, which was subject only to the then existing law, and make it subject to another mode of enquiry? I was much impressed with this objection at first, and was for a time strongly inclined to think that it was well-founded, and that the new rules, though operative as to all future suits, were not operative in this. But further argument, and a full consideration of this question, have satisfied me that this objection is not well-founded."

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" . . . . I think that if it were an alteration in the mode of proceeding only, to the prejudice of the claimants, the objection would not prevail. It is clear that there is a material difference when an Act of Parliament is dealing with a right of action already vested not intended to be taken

1. (1864) 10 House of Lords 704: 11 E.R. 1200.

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away; and when it is dealing with mere procedure to recover those rights, which it may be quite reasonable to regulate and alter."

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"The right of the suitor is to bring the action, and to have it conducted in the way and according to the practice of the Court in which he brings it; and if any Act of Parliament, or any rule founded on the authority of the Act of Parliament, alters the mode of procedure, then he has a right to have it conducted in that altered mode. That, therefore, takes away nothing. The right of action does not constitute a title to keep all the consequences of the right as they were before. It gives the right to have the action conducted according to the rules then in force with respect to procedure. I am, therefore, clearly of opinion, that if the provisions of the rule had been in an Act of Parliament of the same date, the Act would have affected existing suits, and would unquestionably have given an appeal in suits in which verdicts were already obtained."

I may add that in the case already cited *Surendranath De* v. *Manohar De*[1] it is held that S. 69 is operative not to affect an existing right, but merely to make an alteration of procedure to enforce that right. Though as I have said I do not find myself in agreement with the construction of S. 74 adopted by the learned Judges in that case, their interpretation of S. 69 is in my view, if I may say so with respect, a correct one. The same conclusion has been reached in recent cases of this Court. The case at *Parinchu* v. *Ravi Varma*[2] is one instance.

I now come to the second argument which has been raised in the appeal and that is, that although the suit may have been bad at the time of the institution, the Courts below should have held that it was good from the date when the firm got itself registered. In support of this argument the case reported as *Ramakrishna Nadar* v. *Ponnayya Thirumalai Vandaya Thevar*[3] is cited. That was a case where the plaintiff, having applied to be allowed to sue as a pauper and his application having been refused subsequently instituted a suit in the ordinary manner. But he did so without first paying the costs of the pauper petition to the defendant. The suit was accordingly dismissed, though prior to the dismissal of the suit he had deposited the costs in question. It was held by this Court on the appeal of the plaintiff that the Court below need not have dismissed the suit altogether, that it was unnecessary to go through the formality of a dismissal and re-institution the next moment after payment of the costs of the pauper

1. (1934) I.L.R. 62 Cal. 213.
2. (1936) 45 L.W. 276.
3. (1935) 69 M.L.J. 791.

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application. The words of O. 33, r. 15 are:

"The applicant shall be at liberty to institute a suit in the ordinary manner provided that he first pays the costs, etc."

And these words in my opinion have the same effect as S. 69 (2) of the Partnership Act, which is that no suit to enforce a right shall be instituted unless the firm is registered. O. 33, r. 15 might read 'no suit shall be instituted by the applicant unless the costs of the pauper petition are first paid.' On the analogy, therefore, of this decision in *Ramakrishna Nadar* v. *Ponnayya Thirumalai Vandaya Thevar*[1] it is contended by the learned Government Pleader that the appellant's suit should not have been dismissed but should have been regarded as instituted on the date when the firm was registered which was 15th January, 1934; and in support of this argument it is pointed out that the defendant in the suit was not aggrieved by the delay or default in getting the firm registered, because he raised no objection to the progress of the suit while the trial was going on, but only at the stage of argument did he disclose the fact to the Court that the suit had been filed at a time when the firm was not registered. In my opinion, the circumstances of this case are different from those in *Ramakrishna Nadar* v. *Ponnayya Thirumalai Vandaya Thevar*[1]. The circumstances of the two cases would be similar if in the present case the plaintiff firm had come to Court on 15th January, 1934, and asked to be allowed to withdraw his suit on the ground that it was incompetent and to file another immediately. It was not until a year later that the Court in the present case was informed that the suit as filed was incompetent. The defendant in the ordinary course must be taken to have assumed when the suit was filed that the plaintiff firm was a registered firm and that it was registered under the style and title found in the plaint. But, when in March, 1935, after the trial was over, the defendant discovered that the suit firm had not been registered at the time of the plaint, then only was he in a position to ascertain the real identity of the plaintiff by consulting the certificate of Registration. I do not say that he was actually prejudiced in the present case; but certainly cases can be imagined in which the certificate of registration might disclose some change in the nature of the firm which would support a possible defence against the claim. On the

1. (1935) 69 M.L.J. 791.

whole, therefore, I am inclined to interpret S. 69 strictly and to hold that the suit instituted contrary to its provisions is bad and cannot be subsequently validated by compliance with those provisions. In the result this second appeal is dismissed with costs.

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Leave to appeal is requested and it is granted.

S. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Malai and others .. *Accused* in Calendar Case No. 95 of 1937, on the file of the Court of the Town Sub-Magistrate of Trichinopoly.*

Malai, *In re.*

Criminal Procedure Code (V of 1898), S. 252—Magistrate issuing summons for an offence under S. 426, Indian Penal Code—Accused appearing before him—Magistrate changing his mind and proceeding to act under S. 252, Criminal Procedure Code—Magistrate not precluded from framing a fresh charge.

Where a Magistrate issued summons to the accused for an offence only under S. 426, Indian Penal Code, and when the accused was brought before him, he did not apply S. 242, Criminal Procedure Code, but informed him then and there that on reconsideration he held that other offences also were disclosed by the complaint and proceeded from that moment to apply S. 252, Criminal Procedure Code, the decision in *Rajaratnam Pillai,* In re, (1936) 70 M.L.J. 340: I.L.R. 59 Mad. 442, does not and cannot apply, as in that case the Magistrate had not only taken cognisance of an offence triable only under Ch. XX of the Code but had actually applied Ss. 242 and 244 and taken evidence.

Rajaratnam Pillai, In re, (1936) 70 M.L.J. 340: I.L.R. 59 Mad. 442, distinguished.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code, by the District Magistrate of Trichinopoly in his letter Cr. R. C. No. 2 of 1937, dated 6th May, 1937.

The following summary of the facts is taken from the order of reference made under S. 438 by the Magistrate to the High Court.

The petition out of which the reference arose was filed under Ss. 435 and 438, Criminal Procedure Code, to call for the records in C. C. No. 95 of 1937 on the file of the Trichinopoly Town Second

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* Crl. R. C. No. 333 of 1937. 18th August, 1937.
(Case Refd. No. 24 of 1937).

Malai, *In re.*

Class Magistrate and to report to the High Court the illegality of the proceedings of that Court in certain respects.

The first point taken was that the complaint purported to be for an offence under S. 500, Indian Penal Code, in addition to other offences; that an offence under S. 500 cannot be tried by the Second Class Magistrate and that therefore he had no jurisdiction to receive the complaint and record the sworn statement. The Second Class Magistrate held that the complaint did not disclose an offence under S. 500 but one under S. 504. The District Magistrate held there was no substance in this objection.

The second point taken was this. The lower Court having recorded the sworn statement took the case on file against all the accused for an offence under S. 426, Indian Penal Code, and issued process to the accused in respect of this offence alone; and when the accused appeared, instead of examining the accused in respect of the offence under S. 426, Indian Penal Code, and following the procedure applicable to summons cases, the Second Class Magistrate, on reconsideration apparently holding that the complaint disclosed also offences under Ss. 452, 504 and 506, Indian Penal Code, triable for warrant case procedure adopted the procedure for trial of warrant cases and ultimately framed charges against the accused not only for an offence under S. 426, Indian Penal Code, but also for offences triable under warrant case procedure. The District Magistrate felt that this was covered by In re *Rajaratnam Pillai*[1] and that therefore the Second Class Magistrate was precluded under S. 246, Criminal Procedure Code, from framing a charge, for an offence not triable as a summons case and therefore reported the case for orders of the High Court with a recommendation that the proceedings of the Second Class Magistrate may be set aside, and that the case may be sent back for trial only for an offence under S. 426, Indian Penal Code.

Public Prosecutor on behalf of the Crown.

Accused not represented.

The Court made the following

ORDER.—This reference is made on the assumption that the facts are governed by a decision of my own reported in *Rajaratnam Pillai, In re*[1]. The facts are obviously distinguishable. In *Rajaratnam Pillai, In re*[1], I had to deal with a case in which the Magistrate had not only taken cognisance of an

1. (1936) 70 M.L.J. 340: I.L.R. 59 Mad. 442.

offence triable only under Chapter XX of the Code but had actually applied Ss. 242 and 244 and taken evidence. In the present case though the Magistrate had issued summons to the accused for an offence under S. 426 only he did not apply S. 242 when the accused was brought before him, but informed him then and there that on reconsideration he held that other offences also were disclosed by the complaint, and proceeded from that moment to apply S. 252.

It is no doubt stated with some lack of precision in *Rajaratnam Pillai,* In re[1], that when once a Magistrate has 'taken cognisance of' an offence which is triable only according to the procedure applicable to summons cases, etc., but the argument is clear that I was concerned solely with Chapter XX and the provisions of S. 246. A situation such as has now arisen was not then contemplated and was obviously not being considered. I accordingly hold that the decision in *Rajaratnam Pillai,* In re[1], does not and cannot apply to the facts of this case.

That a Magistrate has power to change his mind in regard to the exact offences which a complaint discloses before he begins to enquire into the case cannot be denied on general principles—and even if it be argued that in the present case he has impliedly dismissed a complaint under other sections of the Penal Code than S. 426 he still has power to re-entertain a complaint on the same facts without the need of any action by any superior Court. (Vide *Emperor* v. *Chinna Kaliappa Gounden*[2] and *Ponnuswami Gounden,* In re[3].)

In the result I am unable to accept the learned Magistrate's reference and must decline to interfere.

S. V. V. —— *Reference not accepted.*

1. (1936) 70 M.L.J. 340: I.L.R. 59 Mad. 442.
2. (1905) 16 M.L.J. 79: I.L.R. 29 Mad. 126 (F.B.).
3. (1931) 62 M.L.J. 469: I.L.R. 55 Mad. 622 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE VENKATARAMANA RAO.

Seshan Pattar's son Ambi *alias* Subramanian Pattar and another .. *Petitioners* (Plaintiff and nil)*

v.

Thandan Kavukal Veeran's son Kelan and others .. *Respondents (Defendants 1 to 3).*

Ambi *v.* Kelan.

Civil Procedure Code (V of 1908), S. 64—Successive attachments—Right to recover rent under later attachment—Mortgage executed by judgment-debtor between first and second attachments—Right of mortgagee to rents of property—Practice—Mortgage executed by mortgagor in favour of manager of joint family—Suit for recovery of rents—Other coparcener impleaded as party—Adverse decision of Court—Appeal by other coparcener—Maintainability—Limitation Act, 1908, S. 22.

Under S. 64, Civil Procedure Code, any private alienation of property pending an attachment would be void only as against all claims enforceable under that attachment. On 11th November, 1927, one *K*, who had filed a suit against *R*, attached certain land before judgment. On 8th December, 1927, a decree was made in that suit and the attachment was confirmed. On 24th June, 1928, the attached land was mortgaged to one *S*. On 12th September, 1928, *K*, the decree-holder, attached the rents due in respect of the land for a particular term and he got himself appointed receiver in execution for the purpose of collecting the rents attached. The question was raised whether the mortgagee or the decree-holder-receiver was entitled to the rents claimed.

Held, that the claim of the decree-holder was under the second and not the first attachment, and the mortgage having been executed earlier, the mortgagee's right to the rents was not affected by reason of the subsequent attachment.

Mina Kumari Bibi v. *Raja Bijoy Singh Dudhuria*, (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P.C.), relied on.

A mortgage was executed in favour of *A*, the manager of a joint Hindu family. Subsequently there was a partition under which the mortgage debt was allotted to the share of *R*, a brother of *A*. The partition deed was however not registered and therefore became inadmissible in evidence. *A* filed a suit for rent on the foot of the mortgage and prayed that a decree might be passed in his favour or in favour of *R*, who had been impleaded as party. The suit was dismissed and *R* preferred an appeal.

Held, that the appeal preferred by *R* was competent, as he was a party on record and as he was affected by the adverse judgment of the trial Court. Even if he had not been on record it would be open to him as a member of the joint family entitled to the mortgage-debt to prefer the appeal with the Court's leave.

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* C. R. Ps. Nos. 1923 of 1929, 74 and 75 of 1930, 163 and 164 of 1930, 172 to 174 of 1930, 219 of 1935 to 246 of 1935 and 581 of 1935. 15th January, 1937.

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The general rule enacted in S. 22 of the Limitation Act as to the effect of substituting or adding a new party is subject to certain exceptions mentioned in cl. (2) of that provision, one of them being that the rule of limitation enacted in the main part does not apply where there has been a transposition of the parties already on the record.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsiff of Palghat dated 11th April, 1929 and made in Small Cause Suit No. 2 of 1929.

B. Sitarama Rao, T. S. Anantaraman, A. Ramamurti, C.S. Swaminathan, C. K. Viswanatha Aiyar and *K. Kuttikrishna Menon* for Petitioners.

P. Govinda Menon, C. Vasudeva Mannadiar and *D. A. Krishna Variar* for Respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—These are two batches of civil revision petitions and although they both arise out of similar claims, the contentions that have been put forward and therefore require to be considered are different. For a proper appreciation of the points raised, it will be necessary at the outset to set out the relevant dates.

(*i*) On 11th November, 1927, Kunjunni Nair (the respondent) in the suit filed by him against one Ramaswami Pattar (O. S. No. 45 of 1927) attached the land in question before judgment.

(*ii*) On 8th December, 1927, a decree was made in that suit and we understand (although this is of no consequence) that in it was specifically mentioned that the attachment before judgment was confirmed.

(*iii*) On 24th June, 1928, the suit land, attached as mentioned above, was mortgaged to Ambi *alias* Subramania Pattar (the petitioner before us) who, on the strength of his mortgage, filed most of the suits in the Courts below claiming rent.

(*iv*) On 12th September, 1928, Kunjunni Nair, the decree-holder in O. S. No. 45 of 1927, attached the rents due in respect of the suit land for a portion of the year 1104 (1928 A.D.) payable in the month of Kanni. As will be observed, what was attached before judgment was *the land* itself; the attachment now effected was of *the rents due* for a period.

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(v) On 15th November, 1928, Kunjunni Nair, the decree-holder, was appointed receiver in execution for the purpose of collecting the rents attached.

In the first batch of Petitions (Nos. 1923 of 1929, 74 of 1930, 75 of 1930, 163 of 1930, 164 of 1930 and 172 to 174 of 1930) the question raised is, which of the two persons has a valid right to the rents claimed—Ambi the mortgagee or Kunjunni Nair, the decree-holder-receiver? As will appear presently, in the second batch of cases the mortgage in favour of Ambi was impugned as fraudulent, but that contention does not seem to have been raised in the lower Court in the present batch. The only question therefore that arises for decision in the first batch of petitions, as already stated is, which of the two rival claimants is entitled to the rents? It was argued by Mr. Govinda Menon for the respondent that the mortgage in favour of Ambi, effected as it was during the subsistence of, and contrary to, his attachment, would be void. If this contention were right, Ambi's claim to rent would fail. But the learned Counsel's argument ignores, as Mr. Sitarama Rao rightly points out, the effect of the cardinal words in S. 64, Code of Civil Procedure, which makes it perfectly clear that any private alienation pending an attachment is to be void only "as against all claims enforceable under the attachment". The question shortly therefore is, does the claim put forward on behalf of the receiver answer this description? The transfer in favour of Ambi was made, as the dates show, subsequent to the first attachment, but what we have to decide is whether the claim now made by the respondent is one arising under *that* attachment, for, the effect of the section is, not that a private transfer is absolutely void but void only as against the claims enforceable under the attachment. If therefore the respondent's claim can in law be regarded as one made *under the first attachment,* it must take precedence of the mortgagee's right. But the claim to rent which the respondent puts forward, arises not in virtue of the first attachment but of the second. It is perfectly true that the decree-holder could have taken further proceedings without effecting a second attachment, but what in actual fact happened was, that the rents as distinguished from the property were attached and they were the subject-matter of the second attachment and it was in furtherance of the last-mentioned attachment that the receiver

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was appointed. The private transfer in favour of Ambi was on a date previous to the second attachment and could not be affected by any claim arising under it. Going back to the first attachment effected of the land, granting that this was followed up by further proceedings, would the purchaser at an execution sale or, for that matter, a receiver that might be appointed in execution, be entitled to the rents? It cannot admit of doubt that such a person can have no claim to the rents during the intervening period, that is, between the date of the attachment of the land and the Court sale, or, the appointment of the receiver, as the case may be. In short, the claim of the respondent is one arising under the second and not the first attachment, and the transfer in favour of Ambi, though subsequent to the latter, was antecedent to the former and it follows from this, that the respondent's contention cannot prevail. *Mina Kumari Bibi* v. *Raja Bijoy Singh Dudhuria*[1] is an instructive case. There were two decrees and there was an attachment under each of them. The private transfer in favour of the appellant was made five years after the attachment *A* but one day before the attachment *B* and it was at the sale held in pursuance of the attachment *B* that the respondent purchased the property. Held, that the earlier attachment, whether it was subsisting or not, did not give the respondent any right to the property as against the appellant. Referring to S. 276 of the Code of 1882, corresponding to S. 64, their Lordships observe:

"That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. *Ex hypothesi*, the alienation to the plaintiff was not during the continuance of the attachment in execution Case No. 16 of 1907, or, in other words, the attachment under which the execution sale to the decree-holder was made. Therefore it cannot be avoided by that attachment."

In the result, the following civil revision petitions (Nos. 1923 of 1929, 74 of 1930 and 172 to 174 of 1930) are allowed; but we make no order as to costs here or in the Court below. In each case there will be a decree for the amounted claimed.

C. R. Ps. Nos. 163 and 164 of 1930 of this batch have been settled and withdrawn. Dismissed. No costs.

C. R. P. No. 75 of 1930.—In this, the receiver is the petitioner and not Ambi. From what we have said, it follows

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1. (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P.C.).

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that this petition also should stand dismissed. There will be no order as to costs either here or in the Court below.

We now turn to the second batch (C. R. P. Nos. 219 of 1935 to 246 of 1935 and 581 of 1935). Here, as already observed, the mortgage in favour of Ambi *alias* Subramania Pattar was impeached, but the lower appellate Court has found, differing from the Court of First Instance, that the transaction is valid and we see no reason for disturbing that finding of fact.

But the question that has been argued, arises in somewhat curious circumstances. Ambi, on the date of the mortgage in question, was the manager of a joint Hindu family consisting of himself and his brothers Narayana Pattar and Rama Pattar. Subsequently there was a partition and it was to Rama Pattar that the debt evidenced by the mortgage was allotted. The partition arrangement was in writing, which however was not registered. Under the decisions, such a writing, though affording evidence of a division in status, is inadmissible for proving the terms of the partition. Ambi, realising this, filed suits for rents in his own name, impleading, however (quite unnecessarily), Rama Pattar as defendant. The first Court, holding, as already stated, that the mortgage in his favour was fraudulent, dismissed his suits. The learned District Judge on appeal, though he reversed the first Court's finding of fact, still confirmed its judgment. It happened in this way. The appeals before him were filed not by Ambi, the unsuccessful plaintiff but by Rama Pattar who, as already stated, was impleaded as defendant. The learned Judge held that the appeals filed by him were incompetent and dismissed them for that reason, thus upholding, though on a different ground, the first Court's judgment. The short question is, were the appeals filed by Rama Pattar incompetent? The partition arrangement not having been registered, the suits, it must be held, were properly instituted in the name of Ambi. He was not only the manager of the family but the person in whose name the mortgage was taken. So he rightly instituted the suits as plaintiff; but should the Court hold that the writing was admissible, the right would vest in Rama Pattar, in whose favour alone a decree could be passed. Therefore it is not surprising that Ambi claimed that a decree either in his favour, or, in favour of Rama Pattar, in the alternative, should be passed. But, whether

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the procedure was right or wrong, he was there on the record as a party and the judgment dismissing the suits negatived his right. We fail to see why in these circumstances he should not have an independent right of appeal. Ambi, who had nothing to lose by the adverse judgment, was content to leave the matter there. But does that prevent any member of the family, whose interest is imperilled, from filing an appeal? To all intents and purposes, the mortgage still remained the property of the joint family; that is the effect of the partition arrangement being inadmissible in evidence. If this be so, it ought to be open to any member of the joint family to challenge the judgment negativing its right. Raman Pattar was one such member and even had he not been on the record, it would have been open to him, with the Court's leave, to file an appeal. But, owing to what must now be regarded as an accident, he was on the record as a party and that, if at all, should be an additional ground for holding that the appeal was competent.

The lower Court observes that had Raman Pattar applied to it to be transposed as plaintiff, his application would have been barred by limitation. This question does not really arise but we must point out that the learned Judge's view is wrong. The general rule enacted in S. 22 of the Limitation Act as to the effect of substituting or adding a new party is subject to certain exceptions mentioned in cl. (2) of that provision, one of them being, that the rule of limitation enacted in the main part does not apply where there has been a transposition of the parties already on the record.

In the result, except as regards the petition to be mentioned, all the other petitions are allowed; in each case the plaintiff will have a decree for the amount claimed. There will be no order as to costs either here or in the Courts below. As to C. R. P. No. 581 of 1935, it is dismissed but without costs.

We have now to make orders in respect of certain matters which are common to both sets of civil revision petitions. The need for those orders has thus arisen. In the first place, the tenants have not been represented in this Court. Secondly, while general questions have been argued, the counsel have not been in a position to deal with such facts as are peculiar to each case. The following order is made by consent.

1. Mr. Govinda Menon believes that in some cases to which Ambi or his brother has been a party, the claim of his

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client has been affirmed to rents due from some tenants. If any such judgments are produced in three weeks from to-day the decrees in the concerned cases will be vacated; otherwise they will stand.

2. If in any one of the cases before us the tenants have pleaded that rents had previous to the suits been paid to the respondent, to that extent there will be no decrees against the tenants and this will be taken note of by the office when drafting the decrees.

3. If the respondent, in pursuance of the lower Court's decrees, has before this date, been paid by any of the tenants, any rents, the petitioner or his brother will not be entitled to have restitution of those rents. It is stated that wherever there has been such receipt of rents, it has been under orders of Court.

B. V. V. —— *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE NEWSAM.

Ramakkal and others .. *Petitioners** (*Accused*).

Ramakkal, *In re.*

Indian Penal Code (XLV of 1860), S. 411—Money found—Intention to misappropriate—No actual conversion to use—Charge under S. 411, inapplicable.

A person lost from his shirt pocket four currency notes of the value of one hundred rupees each. The four notes were picked up by a child of six and a wrangle arose between the child that picked them up and another for the possession of all the notes. Attracted by the quarrel a passer-by snatched them in order to give them to the father of the child, but he was met by accused 1 who claimed prior right to them. Accused 2 and 3 had each a one hundred rupee note from accused 1. On enquiry by the owner the matter was investigated with the result that all the three accused produced the notes. On the question what, if any, offence was committed,

Held, that the charge framed under S. 411, Indian Penal Code, was inapplicable to the facts and tended to obscure the real issue. If the facts proved that actual appropriation of the notes was made or that the accused actually converted the notes to their own use then only the offence committed by all the three accused would be clearly an offence of criminal misappropriation.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate of Gobichettipalayam dated 5th April, 1937, and made in C. C. No. 700 of

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* Cr. R. C. No. 296 of 1937. 23rd September, 1937.
Cr. R. P. No. 272 of 1937.

1936, framing the charge against the accused under S. 411, Indian Penal Code. Ramakkal, *In re.*

K. S. Jayarama Aiyar and *C. K. Venkatanarasimham* for Petitioners.

Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—This is a revision petition asking the Court to quash a charge framed under S. 411, Indian Penal Code, against three persons.

The facts appear to be as follows:—

P.W. 2 while waiting to deposit money into the bank at Gopichettipalayam lost from his shirt pocket four currency notes of the value of one hundred rupees each.

He noticed this loss at about 10 A.M.

The four notes were picked up in the street by P.W. 6—a child of six. P.W. 6 gave a young friend of his (P.W. 7) one note, but P.W. 7 was insisting on getting two. Their wrangles attracted the attention of a passing barber (P.W. 4) who snatched all four notes from them. The children clamoured for the return of the notes and held his coat, but the barber took them with him to hand them and the money to P.W. 6's father whom he knew. On the way he met P.W. 6's grand-mother (accused 1). She asked where he was taking P.W. 6 and on being told the facts, she claimed a prior right to these notes. So, P.W. 4 handed over the four notes to her, but he went on, and told P.W. 6's father (accused 2) what had happened. Accused 2's employer (accused 3) also heard the story from the barber.

It appears that accused 2 and accused 3 then sent for accused 1 and each of them took one one hundred rupee note from her.

P.W. 4 came back later to accused 3's shop in which accused 2 is employed and was paid Rs. 20 by accused 3 as a regard for his pains and as an inducement to keep his mouth shut.

Meantime, the owner of the notes (P.W. 2) was making enquiries and had got a policeman to help him in his search. Some people fortunately for the owner had seen the barber (P.W. 4) take the notes from the children. The barber (P.W. 4) was soon found and he referred the policeman to the

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boy's grandmother. When first questioned P.W. 6's grandmother (accused 1) denied all knowledge, but later she produced two currency notes of one hundred rupees each. Accused 2 (P.W. 6's father) produced one hundred rupee note and also a ten rupee note. These notes were recovered by 12 noon, that is, within two hours. At 3 P.M. accused 3 was questioned and at first he denied all knowledge but as soon as he was arrested, produced the last of the hundred rupee notes. This last note was recovered by 3 P.M.

Assuming these facts to be true, the question arises, what, if any, offence has been committed.

Explanation 2 to S. 403, Indian Penal Code, lays down the law in regard to property found. A very high standard of honesty is demanded of the finders of lost property. Before appropriating it, they must attempt to find the owner, if they have means of so doing. If there is no clue to the owner, the finder must use all reasonable means to find the owner and must wait a reasonable time to allow the owner to claim the property before he appropriates it.

Now it is clear, if the facts stated above are proved, that there was a dishonest intention to appropriate the notes, an intention shared by all three accused, just as the notes were shared.

The difficulty is to say whether appropriation or conversion to their own use had actually taken place, whether the matter went beyond the stage of intention and preparation. I must leave this difficult question to the learned Magistrate to decide for himself after hearing all the evidence. Perhaps the best defence to a charge of criminal misappropriation in these circumstances would be to admit dishonest intention and even preparation to commit criminal misappropriation but to deny actual appropriation or conversion, and to plead in extenuation that the standard set for the finders of money is much above the standard of popular opinion.

I must dispose of this revision petition with the remark that the charge framed under S. 411, Indian Penal Code, is inapplicable to the facts and tends to obscure the real issue. If the prosecution satisfactorily proves the facts extracted above and if the learned Magistrate is able to find after hearing the defence case that actual appropriation of the notes was complete or that the accused actually converted the notes

to their own use, then the offence committed by all three accused is clearly the offence of criminal misappropriation, the charge under S. 411, Indian Penal Code, is hereby quashed and the Magistrate is directed to make further enquiry into this case and to consider in the light of the above remarks whether he should frame a charge under S. 403, Indian Penal Code, or discharge the accused. Nothing that I have said should prejudice the Magistrate in deciding one way or the other in this matter.

The petition is allowed.

K.C. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

P. L. S. P. L. Palaniappa Chettiar .. *Petitioner* (1st Respondent)*

v.

Y. P. R. Y. N. Y. Chidambaram Chettiar and others ... *Respondents (Petitioner and Respondents 3 to 5).*

Provincial Insolvency Act (V of 1920), S. 9 (1) (c)—Petition by creditor —Alleged acts beyond three months owing to the intervening of summer recess—Amendment prayed for by creditor to include fresh acts of insolvency —Grave injustice to the insolvent—Whether permissible under the circumstances.

A petitioner (insolvent) sought to set aside certain amendments of the creditor (petitioner in lower Court) to his petition praying that the insolvent and other respondents be adjudged insolvents and the creditor in his petition had relied on certain acts of insolvency which were transfers of property effected during the three months prior to the closing of the Court for summer recess on 1st May, 1934, and which did not cover the acts which might have been committed by them subsequently within three months before the actual presentation of the petition. As the petition for insolvency was presented on the 3rd July, 1934, and the alleged acts of insolvency were stated to have been committed on 20th February, 1934 and 23rd February, 1934, an application for amendment was considered necessary. This was made on his behalf on 23rd July with the object of including other acts of insolvency committed by them in April, May and July, 1934. They were not mentioned either specifically or generally and were proposed to be brought, as the acts committed before the 3rd April could not, according to the decision of Full Bench in *Chenchuramana Reddi* v. *Arunachalam,* (1935) 69 M.L.J. 283: I.L.R. 58 Mad. 794 (F.B.), form a basis for adjudicating the petitioner as insolvent.

Held, if the amendments were allowed the petitioning creditor would be enabled to substitute new grounds for those which he had set up originally

* C. R. P. No. 1350 of 1936. 2nd September. 1937.

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but which are of no avail to him now. This was bound to cause serious injury and grave injustice to the other party, which could not be compensated by costs. Hence the application could not be granted.

It is true that the Courts have wide powers in this matter but they have to be exercised judicially and with care. The effect of granting this amendment would be to clothe the petitioning creditor with rights which he would not have had if a new petition for insolvency was presented by him on the date on which he applied for leave to amend.

Case-law discussed.

Petition under S. 75 (1) of Act V of 1920, praying the High Court to revise the order of the District Court of Ramnad at Madura dated 3rd October, 1936 and made in C. M. A. No. 49 of 1935 preferred against the order of the Court of the Subordinate Judge of Devakottai dated 10th August, 1935 and made in I. A. No. 177 of 1935 in I. P. No. 39 of 1934.

R. Krishnaswami Aiyangar for Petitioner.

T. L. Venkatarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner seeks in this case to revise the orders passed by the District Judge of Ramnad at Madura on 3rd October, 1936, confirming those of Additional Sub-Judge of Devakottai who had permitted respondent No. 1 to amend his petition which he had presented to the Court on 3rd July, 1934, praying that the petitioner and other respondents to these proceedings be adjudged as insolvents.

The petition has been very ably argued on behalf of the parties, and I have been called upon to satisfy myself whether the orders passed by both these Courts were according to law. Respondent No. 1 had in his petition for the adjudication of the petition and the remaining respondents, relied on certain acts of insolvency which were stated by him in para. 6 of his petition. I have examined para. 6 of the petition generally and para. 6 (*c*) of the petition particularly, and am of the opinion that the transfers referred to in that clause were only those which were alleged to have been effected by the respondents to the petition during the three months prior to the closing of the Court for summer recess on 1st May, 1934, and did not cover the acts which might have been committed by them subsequently, that is, within the three months before the actual presentation of the petition.

There is no doubt that the petition for amendment was presented on account of a Full Bench decision of this Court

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in *Chenchuramana Reddi* v. *Arunachalam*[1] in which while over-ruling *Narayana Aiyar* v. *Official Receiver, Calicut*[2], it was held that the period of three months fixed in S. 9 (1) (*c*) of the Provincial Insolvency Act is not a period of limitation but is a condition precedent during which the alleged acts of insolvency must have been committed by the person or persons who is, or are, proposed to be adjudicated. It was accordingly held that the period of vacation would be of no avail to the petitioner in increasing the period within which the alleged acts of insolvency must be proved to have been committed by the respondents, and the provisions of the Limitation Act would not be able to help the petitioner in extending that period on account of the fact that the period of three months expired at a time when the Civil Courts were closed for long vacation.

As the petition for insolvency was in this case presented on 3rd July, 1934, and the alleged acts of insolvency were stated to have been committed on 20th February, 1934 and 23rd February, 1934, an application for amendment was considered to be necessary. This was made on his behalf on 23rd July, 1935, with the object of including other acts of insolvency committed by the respondents in April, May and July, 1934. These were not mentioned either specifically or generally and were proposed to be brought, as the acts committed before the 3rd of April could not, according to the Full Bench decision, form a basis or ground for adjudicating respondents on the petition presented to the Court on 3rd July, 1934. It might be stated in passing that the Full Bench decision gave effect to the rulings in Ex parte *Games*: In re *Bamford*[3] and In re *Maund*: Ex parte *Maund*[4].

I have tried to show that this was not as stated by the District Judge in his judgment dated 3rd October, 1936, merely a case of specifying the acts in detail which had already been alleged. The application for amendment was put in with the object of saving it from being dismissed by pleading further acts of insolvency which according to the Full Bench authority were no longer so and had ceased to be impeachable under the Insolvency Act. It must be stated at the outset that under the provisions of the Insolvency Act the provisions relating to amendment of pleadings contained in the Code of Civil Proce-

1. (1935) 69 M.L.J. 283: I.L.R. 58 Mad. 794 (F.B.). 2. (1933) 39 L.W. 449.
3. (1879) 12 Ch. D. 314. 4. (1895) 1 Q.B. 194.

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dure, would be applicable to the petitions made under the Act. I am also fully aware of the established rules and practice of the Courts, both in England and in India, which act with considerable liberality in the matter of granting amendments and " which should be allowed " as remarked by Lopes, L.J., in *Weldon* v. *Neal*[1]:

" However negligent or careless the first omission and however late the proposed amendment, the amendment should be allowed if it can be allowed without injustice to the other side."

But the limitations of this rule have been on account of a series of authorities also well defined. As pointed out by Lord Buckmaster in *Ma Shwe Mya* v. *Maung Mo Hnaung*[2]:

" All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full power of amendment must be enjoyed, and should always be liberally exercised."

The noble lord, however, adds the following qualification which should not be lost sight of:

" Nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another ".

If I found that respondent No. 1 was in this case relying on the same cause of action which he had pleaded in the petition or that he was merely asking for further relief or an appropriate remedy which he had on account of some slip or mistake forgotten to ask in his petition, it would not have been necessary for me to examine the orders passed by the lower Courts minutely and revise them if necessary. But when I find that by this devise respondent No. 1 wishes the Courts to help him in alleging new acts of insolvency which according to the Full Bench authority had become unimpeachable and ceased to be acts of insolvency in fact under S. 9 of the Act and on which he neither relied nor did he intend to rely when presenting his petition, the matter assumes a different complexion. If the amendment were allowed to remain, the petitioning creditor would be enabled to substitute new grounds for those which he had set up originally but which are of no avail to him now. This is bound to cause serious injury and grave injustice to the other party which cannot be compensated by costs. It is true that the Courts have wide powers in this matter but they have to be exercised judicially and with care. The effect of granting this amendment would be to clothe the petitioning creditor

1. (1887) 19 Q.B.D. 394 at 396.

2. (1921) L.R. 48 I.A. 214: I.L.R. 48 Cal. 832 at 835 (P.C.).

with rights which he would not have had, if a new petition for insolvency was presented by him on the date on which he applied for leave to amend.

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In these circumstances I hold that an amendment of this nature prayed could not be granted. The amendment is therefore cancelled and the petition allowed with costs throughout.

K. C. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE NEWSAM.

Annum Kesanna Chetty and others .. *Petitioners** (*Accused 1 to 9*).

Kesanna Chetty, *In re.*

Madras Gaming Act (III of 1930), Ss. 5 and 6—What is a gaming house—Proof for conviction necessary as to the place being used for such purposes.

If the reasons which induced a Magistrate or a senior police officer to issue a search warrant are not put before the Court, the mere finding of cards or instruments of gaming in the execution of such a search warrant, though evidence, ought never by itself to be treated as sufficient evidence, that is, as proof that the place is a common gaming house.

Where a Magistrate was led to believe that a house was used as a place of gambling on a large scale and the Inspector who conducted the search found not only cards and instruments of gaming but he found the doors shut and bolted inside and when the police broke in, the gamblers scattered, put out the lights, hid themselves and pretended to be asleep,

Held, that as money was found on the person of the owner of the house and in the circumstances above mentioned the inference that the place was kept by the man as a common gaming house was a proper one.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Penukonda in Criminal Appeal No. 5 of 1937 (C.C. No. 217 of 1936, Stationary Sub-Magistrate of Kadiri).

V. Rajagopalachari for Petitioners.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—This petition raises an interesting question as to the scope and meaning of certain sections in the Madras Gaming Act (III of 1930). A "common gaming house" is defined as a place where cards or other instruments of gaming are kept for the profit of the person who owns or occupies the place. In other words it is a place open to all comers for gambling purposes and run by some person for profits either by hiring the room or by hiring the cards, etc. The persons

* Cr. R. C. No. 290 of 1937.
(Cr. R. P. No. 268 of 1937). 13th September, 1937.

Kesanna Chetty, *In re.*

punishable under the Act are the keeper or owner of such a place and persons who frequent such a place for gaming. Gaming in a private house or in a club is not an offence punishable under this Act. S. 9 of the Act contains a presumption that anyone found in a common gaming house during gaming was there for the purpose of gaming. S. 7 states that a man may be convicted of keeping a "common gaming house" even though it be not proved that anyone played for money in that place. These two sections clearly show that the legislature was oppressed by the difficulty of obtaining proof in such cases. The greater part of this short Act is in fact devoted to overcoming that initial difficulty by creating special rules of evidence. But it is S. 6 which presents the greatest difficulty. That section read with S. 5 is to the effect that any cards or instruments of gaming found in any place searched under a search warrant issued by a salaried Magistrate or Deputy Superintendent of Police *who has reason to believe* that the place is used as a common gaming house *shall be evidence* that such place is used as a common gaming house and that the persons found therein were there for the purpose of gaming even though no gaming was seen by the search party. The drafting of these sections is certainly defective. It is quite clear, pace the phraseology of S. 6, that cards or instruments of gaming cannot of themselves be evidence of anything. The obvious meaning is that the finding of cards or of instruments of gaming in such circumstances shall be deemed to be evidence; shall be a ground for the inference that the place is a common gaming house. Now, in most private houses cards or other instruments of gaming are to be found; and therefore there must be some special circumstances to justify the inference that the place is a common gaming house. It is clear that the mere finding of cards or of other instruments of gaming is not sufficient to justify such an inference. The one safeguard provided in the Act for people who have cards in their private houses is that before their houses are searched " a salaried Magistrate " or a "Senior Policeman" must have *reason to believe* that their house is a common gaming house. If he thinks he has reason to believe that and issues a search warrant and cards are found, that is, evidence that the house is a common gaming house. But is it sufficient evidence by itself? Obviously not. The reasons which prevailed with the Magistrate or with the "Senior Policeman" to

issue the warrant must normally be put before the Court and must be tested before a man can be convicted of keeping a common gaming house on such flimsy evidence. Otherwise, the conviction would be based partly on purely artificial evidence and partly on secret information, which cannot possibly have been the intention of the legislature. Nor does the language of Ss. 5 and 6 support such a conclusion. There is a world of difference between saying that a certain fact is evidence of something and saying that it is proof of something. In my judgment each case must be decided on its merits and regard must be had to all the circumstances and the discretion of the Magistrate to accept a case as proved or to reject it as not proved is wholly unfettered and unaffected by S. 6. All that I am concerned to point out is that if the reasons which induced a Magistrate or a Senior Police Officer to issue a search warrant are not put before the Court, the mere finding of cards or instruments of gaming in the execution of such a search warrant, though evidence, ought never by itself to be treated as sufficient evidence, that is, as proof that the place is a common gaming house.

Turning to the present case, the first petitioner has been fined for keeping a common gaming house and eight others for being found gaming there. The search warrant (Ex. B) was issued by a Magistrate who stated therein that he had been *led to believe* that the house of first petitioner was used as a *place for gambling* on a large scale. I think it unfortunate that he should confess that he was only led to believe this and shrank from saying plainly that he had good reason to believe it. It is also a strange suggestion that the scale on which gambling was indulged in was a relevant consideration. The really important and relevant matter seems to have escaped the Magistrate altogether, namely, whether there was reason to believe that the house was a common gaming house. Moreover, I find that the only evidence offered by the prosecution was the evidence of P. W. 1, the Inspector of Police, who conducted the search. He says that at 11 P.M. on the night of the search he was informed that gambling was going on in first petitioner's house on a large *scale*. He hastily obtained a search warrant and raided the house at 12-30 A.M. In these circumstances and in this state of the evidence, if the Inspector had found only cards or instruments of gaming, I would

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certainly not have been able on the principles above laid down to support the convictions in this case. But what he did find was this. The doors were shut and bolted inside. Through a window the nine petitioners were observed gambling. Eight of them were pilgrims who were visiting that town for a religious festival. When the Police broke in, the gamblers scattered, put out the lights, hid and pretended to be asleep. In all, the police seized Rs. 171-4-10 from the petitioners and by far the bulk of this (Rs. 107-3-2) was found on the person of the first petitioner the owner of the place. In these circumstances, I think it is a proper inference that the place was kept by the 1st petitioner as a common gaming house. I am not prepared therefore to interfere in revision with the convictions or with the sentence imposed. I dismiss this petition.

K. C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE NEWSAM.

The Collector of Kistna at Masulipatam .. *Appellant** (*1st Respondent in C. C. Nos. 1, 5, 7, 10, 20, 22 of 1935 and Respondent in others*)

v.

Sreemanthu Raja Yarlagadda Sivarama Prasad Bahadur, Zamindar of Challapalli .. *Respondent* (*Petitioner—Claimant in all*).

Collector of Kistna *v.* Zamindar of Challapalli.

Land acquisition—Compulsory acquisition—Principles governing determination of value—Melwaram interest in Zamindari land—Deduction of collection charges—Capitalisation on basis of years' purchase—Prevalent rate of interest on Government securities as criterion.

In valuing land or an interest in land for purposes of land acquisition proceedings, the rule as to number of years' purchase is not a theoretical or legal rule but depends upon economic factors such as the prevailing rate of interest on money investments. In determining the value of the melwaram interest in zamindari land acquired for public purposes the method to be adopted should be as follows: it is necessary to start with the gross income of the land which is to be acquired. The next step is to ascertain the net income after making a deduction, say of ten per cent. of the gross income, towards the expenses of revenue collection and administration. The net income thus ascertained should be capitalised by the number of years' purchase, which must depend upon the rate of interest prevailing on gilt-edged securities at the time of the acquisition, that is, on the date of the

*Appeals Nos. 290 to 295 and 354 to 391 of 1935. 3rd August, 1937.

notification under S. 4 of the Land Acquisition Act. Where the prevalent yield on Government securities is $3\frac{1}{2}$ per cent. per annum, the Court will be acting rightly in capitalising the rental value at thirty years' purchase. To the capitalised value so ascertained the Court should add fifteen per cent. by way of compensation for compulsory acquisition.

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Appeals against the decrees of the District Court of Kistna at Masulipatam in C. C. Nos. 1, 5, 7, 10, 20, 22, 42, 47, 49, 50, 51, 53, 58, 60, 63, 65, 66, 68, 71, 73, 77, 79, 87, 88, 90, 94, 96, 98, 100, 102, 104, 108, 112, 114, 127, 138, 143, 146, 154, 156, 162, 164, 197 and 200 of 1935 respectively (O. P. Nos. 1, 5, 7, 10, 26, 28, 71, 76, 78, 79, 80, 82, 87, 89, 92, 94, 95, 97, 100, 102, 106, 108, 116, 117, 119, 123, 125, 127, 129, 131, 133, 137, 141, 143, 156, 167, 172, 175, 183, 185, 191, 193, 242 and 245 of 1935 respectively), in reference under S. 18 of the Land Acquisition Act for enhancement of the amount awarded by the Special Deputy Collector, Masulipatam, in his award.

The Government Pleader (*K. S. Krishnaswami Aiyangar*) for Appellant.

V. Govindarajachari for Respondent.

The Court delivered the following

JUDGMENTS. *Newsam, J.*—The short question arising for decision in all these appeals is what is the proper method of valuing the melwaram interest in land which is being acquired for public purposes. The method adopted by the Land Acquisition Officer in these cases was to deduct the proportionate peishkush from the melwaram revenue and then to multiply the nett income thus found by 20. The learned District Judge was unable to find a better method but thought that the nett income should have been multiplied by 30. Many of the reasons which he gave for adopting the figure 30 in preference to the figure 20 do not at all commend themselves to us.

Newsam, J.

These appeals have been filed by Government with the object of restoring the award passed by the Land Acquisition Officer. Cross-appeals have also been filed by the Zamindar.

Now, it seems to us that the principles which should be applied in assessing the capital value of the melwaram interest in land may be thus stated. It is necessary to start with the one known fact—the gross income of the zamindar from the land which is being acquired. The next step should be to ascertain the nett income. This can be done only roughly by deducting a proportion of the peishkush payable by the

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Zamindar to Government and also a proportion of the cost of revenue collection and administration. Neither calculation presents any real difficulty. We think that it would be fair and equitable to make a deduction of 10 per cent. of the gross income towards the expenses of a revenue collecting and administrative staff. Having thus ascertained the nett annual revenue of the Zamindar from the land being acquired, it must be capitalized by computing the number of years' purchase. Twenty times the nett revenue from property has in the past been commonly taken to be the capital value of any property or interest in property, and the true justification for this was that approximately 5 per cent. was the prevalent rate of interest. But it is clear that the number of years' purchase must depend upon the rate of interest prevailing on gilt-edged securities at the time of the acquisition, that is, on the date of the notification under S. 4 of the Act. The higher the rate of interest on that date, the fewer will be the number of years' purchase. Twenty times the nett income would be fair if the prevailing rate of interest was 5 per cent. but if it was 2½ per cent. nothing less than 40 times the net income would be adequate compensation.

Of course, to the figure thus arrived at must be added the usual 15 per cent. for compulsory acquisition.

Applying these principles to the cases in hand we find that both the Land Acquisition Officer and the learned District Judge failed to make any deduction from the gross income on account of the costs of a revenue establishment. Further we find that the notifications in these cases were made at the end of 1933 in some cases and at the beginning of 1934, in others, when the rate of interest on gilt-edged securities was approximately 3½ per cent. In the circumstances we are not prepared to interfere with the District Judge's order adopting 30 years' purchase as the proper estimate of the capital value of the melwaram, but the income to be multiplied by 30 should first be reduced by 10 per cent. in order to arrive at a true estimate of the Zamindar's income by allowing for essential establishment charges.

We direct therefore that 10 per cent. be first deducted from the gross income to allow for collection charges, then proportionate peishkush should be deducted and the result

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multiplied by 30. Finally 15 per cent. should be added as compensation for compulsory acquisition.

The Government appeals have thus succeeded in part, though not on the grounds urged, while the cross-appeals have failed. In the circumstances, each party will bear his own costs in appeals and in the memoranda of objections.

Let these cases fall into two batches (one batch: Appeals Nos. 290 to 295 of 1935 and second batch: Appeals Nos. 354 to 391 of 1935) for the purpose of computing the fees between the Government and the Government Pleader.

Venkatasubba Rao, J.—I agree.

Venkatasubba Rao, J.

The only real question that these appeals raise is, what is the number of years' purchase at which the rental of the lands acquired should be capitalised? The contention of the learned Government Pleader that there prevails a rule, to be rarely departed from, that no more than twenty years' purchase should be allowed, does not rest upon any sound principle. What does the 20-year purchase rule imply? It means that the value of the property might be taken to be a capital sum which, if invested at the rate of 5 per cent. per annum, would yield an income equivalent to the rent. Thus, if Rs. 500 represent the annual return and the 20-year rule is adopted, the capitalised value of the property would be Rs. 500 $\times$ 20, that is, Rs. 10,000. Now let this sum be invested at 5 per cent. interest. It would yield a return of Rs. 500. Therefore the 20-year purchase rule rests upon this assumption: The owner of the property compulsorily acquired, if paid twenty times the annual rental, would get a 5 per cent. return upon his money (5 per cent. of any given amount being the 1/20th of it). There is another assumption upon which this rule rests, namely, that the return expected from immovable property is 5 per cent. and that therefore if the rental is capitalised at twenty years' purchase, the owner would be properly compensated for the acquisition. It will thus be seen that the rule of the number of years' purchase is not a theoretical or legal rule, but depends upon economic factors, such as, the prevailing rate of interest. That there is no uniform or rigid principle in regard to the number of years' purchase, is illustrated by several decisions. In *Harish Chunder Neogy* v. *Secretary of State*[1] and *Secretary of State* v. *Shanmugaraya Mudaliar*[2] the

1. (1907) 11 C.W.N. 875 at 878.
2. (1893) L.R. 20 I.A. 80: I.L.R. 16 Mad. 369 (P.C.).

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Venkatasubba Rao, J.

rentals were capitalised at twenty-five years' purchase and in *Secretary of State* v. *Sham Bahadur*[1] twenty-three years' purchase was awarded.

The return from landed property, generally speaking, reflects the prevalent rate of interest on money investments. One of the criteria in determining the compensation to be awarded is the market-value of the land at the date of the publication of the notification under S. 4 (1) (*S. 23, Land Acquisition Act*). In the present cases the relevant notifications were published towards the end of 1933 and the beginning of 1934. The Government of India loan at that time took the form of a $3\frac{1}{2}$ per cent. issue liable to income-tax. The issue price was reckoned at Rs. 96 per cent. and the loan was repayable at par between 1947 and 1950. When there is definite evidence that the actual return on investments is $3\frac{1}{2}$ per cent. it would be wrong to adopt the arbitrary rule of the twenty years' purchase. The return having been ascertained, the years' purchase is arrived at by dividing 100 by the figure of such return. In the present cases the return is about $3\frac{1}{2}$ per cent. and the number of years' purchase which it would be right to allow, would therefore be about 30.

The learned District Judge has capitalised the rentals at thirty years' purchase and with his conclusion we agree, although, as pointed out by my learned brother, his reasons are wrong.

The rent that is to be capitalised is the net and not the gross rent and the question arises, what should be the deduction on account of collection charges and other contingencies? Here again there is no uniform rule, but having regard to the nature of the property acquired, we think that besides the peishcush, 10 per cent. of the gross collections may be deducted on account of outgoings.

On this basis the computation should be made and to that sum will be added the statutory allowance of 15 per cent.

B. V. V. *Appeals allowed in part.*

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1. (1884) I.L.R. 10 Cal. 769 at 774.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE NEWSAM.

K. S. Rathinam Pillai and another .. *Petitioners** (*Counter-Petitioners*).

Rathinam Pillai, *In re.*

Criminal Procedure Code (V of 1898), Ss. 110 and 117 (4) and (5)—Joint inquiry into conduct of persons when necessary—Security for persons dangerous to public, when to be demanded—Who are dangerous persons.

A joint inquiry is out of question when the charge is that two persons are so desperate and dangerous as to render their being at large without security hazardous to the community. There certainly can be no such intimate connection between two individuals in regard to their characters as to render them liable to a joint inquisition under S. 117 (5) of the Criminal Procedure Code.

Emperor v. *Angnu Singh,* (1922) I.L.R. 45 All. 109 and *Kutti Goundan,* In re, (1924) 47 M.L.J. 689, followed.

The words of S. 117 (4), Criminal Procedure Code, make it quite clear that this is an exception to the general rule of evidence and like all exceptions, to be sparingly used and only in exceptional circumstances. Conviction by public opinion should only be permitted to take the place of conviction by Court in rare and exceptional circumstances, as for example, where the advent of a suspicious stranger in a village coincides with a series of crimes and suspicion waxes so strong and is so well justified that it may fairly be allowed to take the place of proof and in such unusual circumstances the section sanctions an experimental use of the security section.

Where allegations against the counter-petitioners amounted to this—that hey were tyrannical and high handed, self-appointed village dictators; that t hey fined poor people who disobeyed them, forced people in a better position to put themselves in their power by executing pronotes in their favour, punished labouring men for alleged disrespect to them, and even gratuitously interfered in marriages between third parties,

Held, that as no complaints were ever made by any of the people thus alleged to be bullied against the counter-petitioners nor were they previously convicted for any such offence, there was absolutely no justification for any such experiment or for making any presumption that the counter-petitioners were criminals.

S. 110, Criminal Procedure Code, is intended to protect the public against irresponsible criminal maniacs and desperadoes and that the weapon of public opinion is the only one adapted to the suppression of undisciplined dictators.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the First Class Sub-Divisional Magistrate of Mayavaram in M.C. No. 40 of 1936.

K. S. Jayarama Aiyar for *K. Venkataramani* and *R. Sundaralingam* for the Petitioners.

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* Cr. R. C. No. 228 of 1937. 27th September, 1937.
Cr. R. P. No. 214 of 1937.

Rathinam Pillai, *In re.*

T. S. Anantaraman for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—This is a petition asking the Court to quash security proceedings initiated by the Sub-Divisional Magistrate of Mayavaram against the two petitioners who are mirasidars and residents of Manigramam.

By an order dated 21st November, 1936, the petitioners were called upon to show cause why they should not furnish security for their good behaviour for two years. The order stated that it was based on information that they habitually committed the offences of extortion, mischief, theft and assault and were so dangerous and desperate as to render their being at large, without security, hazardous to the community. It purported in fact to be made under cls. (*a*), (*d*), (*e*) and (*f*) of S. 110 of the Criminal Procedure Code. The substance of the information given to the Magistrate was set out in an appendix consisting of 21 heads of charge.

One hundred and seventeen witnesses were cited to prove the information, twenty-four of these were examined between 9th December, 1936 and 23rd February, 1937 (that is, in 2½ months) and they were examined by the Magistrate, who is a touring officer, at several sittings in nine different camps in his division. As the end was still not in sight, the petitioners then presented this petitition and proceedings were stayed.

Various grounds have been urged on behalf of the petitioners for quashing the entire proceedings; one grievance is that in 1936, the first counter-petitioner was shot at and wounded by some members of the opposite faction who were tried and convicted for the offence. Some persons who gave evidence on behalf of the accused in that case are now witnesses for the prosecution in this case.

Another ground taken is that the time and place at which the incidents mentioned in the heads of charge took place are not given. Some of the incidents are stale, some were the subject-matter of criminal complaints which were dismissed.

In the third place it is urged that there is no justification at all for a joint inquiry. It is not even pretended that the two counter-petitioners (petitioners herein) have been habitually

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associated together or in all the matters now under enquiry. The first incident for example (looting of houses in 1936) relates to the second counter-petitioner only. His men were tried for this alleged offence and were acquitted. The second incident (extortion of Rs. 2-4-0) relates to the first counter-petitioner only, according to the evidence of P.Ws. 8 and 9. But there is no indication in the order that both incidents do not relate to both petitioners, and no details of time and place were given for either.

I propose to take this latter point first. S. 117 (5) of Criminal Procedure Code states that where two or more persons have been associated together *in the matter under inquiry*, they may be dealt with in the same or separate inquiries as the Magistrate shall think just. It has not been denied before me that the two counter-petitioners were not associated together in all the matters under inquiry, and therefore it is not only not just, but it is not legal to deal with them both in the same inquiry. That such a joint inquiry prejudices the counter-petitioners in cases of this nature has been repeatedly laid down. Walsh, J., in a case reported in *Emperor* v. *Angnu Singh*[1] has said:

"Common sense and common justice dictates that proceedings against a man for *badmashi* should be confined to himself alone, unless the case is that he has a confederate or a partner to whom all the evidence is equally applicable."

And Madhavan Nair, J., in a case reported in *Kutti Goundan*, In re[2], approved of these remarks and further approved of a comment in *Hari Telang* v. *Queen-Empress*[3] that a joint inquiry is out of the question when one charge at least is that two persons are so desperate and dangerous as to render their being at large without security hazardous to the community. There certainly can be no such intimate connection between two individuals in regard to their characters as to render them liable to a joint inquisition.

On this ground alone I think the present proceedings should be terminated.

But there is another and I think an even stronger ground for quashing the present proceedings. Neither of the petitioners has ever been convicted of any crime. A mere perusal of S. 110

1. (1922) I.L.R. 45 All. 109. 2. (1924) 47 M.L.J. 689.
3. (1900) I.L.R. 27 Cal. 781.

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is sufficient to show that it is intended to deal with ex-convicts or habitual criminals and dangerous and desperate outlaws who are so hardened and incorrigible that the ordinary provisions of the penal law and the normal fear of condign punishment for crime are not sufficient deterrents or adequate safeguards for the public. As an additional measure of protection against this hopelessly irresponsible class of persons, the section provides that they may be called upon to find truly responsible and reliable persons willing and able to answer to good behaviour of their proteges. In other words persons so addicted to crime that the ordinary sanctions of law are powerless to control their incurable proclivities are placed in much the same category as lunatics. They must either find eligible and responsible guardians or be temporarily confined for the public safety.

The section is obviously not intended for use against merely undisciplined people such as local bosses and faction leaders to clip their wings, to deplete their resources by an expensive inquiry, to humble their pride by treating them as criminal mad men, to advertise publicly their high-handed behaviour. To apply the section to such as these is undoubtedly to abuse it.

It is only possible to do so by interpreting S. 117 (4) of the Code of Criminal Procedure, as if it laid down a general rule of evidence for every security case. The section is as follows:

"*For the purposes of this section* the fact that a person is a habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community *may be proved* by evidence of general repute or otherwise."

The words make it quite clear that this is an exception to the general rule of evidence and like all exceptions to be sparingly used and only in exceptional circumstances. The general rule of law, of course, is that every man is presumed not to be a criminal or an offender until he has been found guilty by a competent Court. Conviction by public opinion should only be permitted to take the place of conviction by a Court in rare and exceptional circumstances, as for example, where the advent of a suspicious stranger in a village coincides with a series of crimes and suspicion waxes so strong and is so well justified that it may fairly be allowed to take the place of

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proof and in such unusual circumstances the section sanctions an experimental use of the security sections. But where a person has lived all his life in a locality and has never even been accused before a Court of law for any crime, far less convicted, there is absolutely no justification for any such experiment or for making any presumption that he is a criminal, not to say a habitual criminal.

In the present case the allegations against the counter-petitioners amount to this—that they are tyrannical and high-handed, self-appointed village dictators; that they fine poor people who disobey them, force people in a better position to put themselves in their power by executing pronotes in their favour, punish labouring men for alleged disrespect to them (such as not dismounting from a bicycle when passing their house), and even gratuitously interfere in marriages between third parties. As no complaints were ever made by any of the people thus bullied, it is safe to conclude either that they were not themselves wholly blameless and had to acknowledge that rough justice had been done to them or that they admire bullies and like being bullied.

It is only necessary to repeat that S. 110, Criminal Procedure Code, is intended to protect the public against irresponsible criminal maniacs and desperadoes and that the weapon of public opinion is the only one adapted to the suppression of undisciplined local dictators.

For the above reasons I direct that these proceedings be terminated.

K. C. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE VARADACHARIAR.

Rahiman Bibi Saheba, by agent Syed Yusuf Sahib .. *Appellant** (*Plaintiff*)

v.

Mahboob Bibi Saheba and others .. *Respondents* (*Defendants*).

Rahiman Bibi Saheba *v.* Mahboob Bibi Saheba.

Muhammadan Law—Marriage of wife's sister during subsistence of prior marriage—Marriage if invalid or void—Issue of marriage legitimate.

Though the marriage by a Muhammadan of his wife's sister during the *lifetime* of his wife is prohibited by the Koran, yet it is a marriage with a

* C. C. C. A. No. 52 of 1935. 1st September, 1937.

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person who may later become a lawful wife, that is, on the death or divorce of the wife, and as such it is only an invalid (*fasid*) and not a void (*batil*) marriage. If, therefore, it is consummated, then the issue of such marriage would be legitimate.

Tajbi v. *Mowla Khan*, (1917) I.L.R. 41 Bom. 485, followed.

Aizunnissa Khatoon v. *Karimunnissa Khatoon*, (1895) I.L.R. 23 Cal. 130, distinguished.

Appeal against the decree of the Court of the City Civil Judge, Madras, in O. S. No. 169 of 1933.

C. Sarangarajan for Appellant.

A. B. Nambiar and *Raffiuddin Ahmad* for Respondents.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—This appeal raises the question whether a child of a marriage contracted by a Muhammadan with his wife's sister, the wife being alive, is legitimate. It also raises questions with regard to the right of certain parties to payments on account of mahar.

The suit was filed by the appellant for the administration of the estate of her deceased father, Syed Mahmood Saheb, a Sunni Muhammadan, who died in Madras on the 17th July, 1930. There were ten defendants, a widow and the sons and daughters of the deceased. The first respondent is the widow. The appellant and the third respondent are the children of the deceased's first wife, who predeceased him. Respondents 2, 5, 6, 8 and 10 are the sons and daughters of the first respondent by the deceased. Respondents 4 and 9 are the children of the third wife, who also predeceased her husband. The seventh respondent is the son of the fifth wife, who survived the husband, but died before the suit was instituted. The first respondent was his fourth wife, and she and the fifth wife were sisters. It is contended by the appellant that the seventh respondent who is the son of the younger sister, is illegitimate, his mother having married the deceased while her sister was alive. It is said that the Muhammadan law prohibits a Muhammadan marrying his wife's sister and if he does take her as a wife her children have no share in the inheritance. The seventh defendant denies that he is illegitimate and, therefore, claims to be entitled to share in the estate of his deceased father. The learned trial Judge held that the marriage was irregular, but that this did not affect the legitimacy of the seventh defendant. With regard to the matter of mahar, the

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claimants are the first and seventh respondents, the first respondent claiming in her own right and the seventh respondent as his mother's heir. The learned Judge held that they were each entitled to a sum of Rs. 585 by way of mahar. The appellant says that they are entitled to nothing.

The question whether a Muhammadan may marry the wife's sister during the lifetime of his wife has been considered by the Calcutta High Court and by the Bombay High Court and they have arrived at different conclusions. The Calcutta case is that of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*[1] and the Bombay case that of *Tajbi* v. *Mowla Khan*[2]. The Calcutta decision stands alone, but the Bombay decision has the support of all the principal modern works on Muhammadan law. The Calcutta High Court holds that a Muhammadan cannot lawfully marry his wife's sister, and that if he has marital relations with his sister-in-law during his wife's lifetime the children born of the union are illegitimate. This decision is largely based on a passage from the Koran. The Koran does prohibit a man marrying his wife's sister, as it prohibits a man marrying his wife's daughter. The Bombay High Court considers that Muhammadan law recognises a difference between a marriage which is void from the beginning and can never become lawful and a marriage with a person who may later become a lawful wife. In the case of a marriage with a wife's sister the marriage would become lawful on the divorce or death of the wife. This view finds acceptance in the Fatwa-i-Alamgiri, which is of undoubted authority. It dates from about the middle of the seventeenth century. Beaman, J., in *Tajbi* v. *Mowla Khan*[2] gives it the place in the Muhammadan law which the Institutes of Justinian occupy in Roman law and points out that it was written when Muhammadanism was at the height of its power in this country.

Modern text books, as I have indicated, are unanimous on the question. In the second edition of Baillie's Digest, the following passage appears at page 157 of part 1:—

"An invalid marriage has no legal effect before consummation; so that if a man should marry a woman by a contract which is invalid by reason of his having previously touched her mother with desire, and should then

1. (1895) I.L.R. 23 Cal. 130. 2. (1917) I.L.R. 41 Bom. 485.

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relinquish the wife, he might lawfully marry the mother. But after consummation it is joint to valid marriages as to its effects, one of which is the establishment of *nusub* or the child's paternity, as already mentioned."

The editor of the fifth edition of "Wilson's Anglo-Muhammadan Law" accepts the Bombay decision although Sir Roland Wilson himself favoured the contrary opinion. Ameer Ali states the position as follows (fourth edition, Vol. II, page 326) :—

"Thus a man may not marry two sisters or a woman and her niece by the same contract or one after another whilst the previous marriage is subsisting. But if such a marriage is contracted in fact, it is *invalid* (*fasid*) but not void (*batil*), for the prior marriage may become dissolved at any time by the death or divorce of one of them and thus validate the second union. Accordingly, although the Judge may separate the parties on the ground of the invalidity of the marriage, if it is consummated the issue would be affiliated to the father, in other words they would be his legitimate children."

This opinion is emphasised at page 391. In the tenth edition of Mulla (page 179) it is said that the bar of unlawful conjunction renders a marriage irregular, not void, and at page 180 there is express dissent from the Calcutta decision.

In view of this weight of authority we feel bound to accept the Bombay decision as being correct. While it is true that the Koran does prohibit a man marrying the sister of his wife during her lifetime, it is clear that this passage in the Koran has never been read as declaring the children of such a marriage to be illegitimate. In fact no writer on Muhammadan law has ever suggested that in the case of an invalid marriage, as opposed to a void marriage, the children are illegitimate. Of course where a Muhammadan marries a person contrary to law and it is not possible in any set of circumstances for that union to become regular the issue would not be legitimate. The present case is one where the marriage was against the law when it was contracted but it was capable of becoming a valid marriage and therefore was valid so far as the seventh respondent is concerned. For these reasons we consider that the decision of the learned trial Judge on the question of legitimacy of the seventh respondent was correct.

With regard to the question of mahar the position is very unsatisfactory. It is impossible on the evidence to say whether anything is due. The seventh respondent in fact made no claim in his written statement to his mother's mahar; but he was allowed to raise the question in the course of argument. We consider that as this question of mahar was not dealt with

adequately by the learned advocates in the Court below, it will be better to send the case back for further evidence on the question whether the first and seventh respondents are entitled to payments on account of mahar and on the question of the amounts. Accordingly the decree of the lower Court will, so far as it affects the matter of mahar, be set aside and the case remanded for re-trial on this question. Leave will be granted to the seventh defendant to amend his written statement so as to make it quite clear that he is claiming to have paid out to him the money which he says was due to his mother on account of mahar. As the appeal has succeeded in part and has failed in part, we propose to make no order as to costs.

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S. V. V. ——— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE NEWSAM.

K. Ramaswami Aiyangar .. *Petitioner* (Accused)*

v.

K. V. Panduranga Mudaliar .. *Respondent (Complainant).*

Ramaswami Aiyangar *v.* Panduranga Mudaliar.

Criminal Procedure Code (V of 1898), S. 195 (b)—Complaint against a Vakil's clerk for alleged offence of forgery—Refusal by Court to prosecute him on the ground of lack of a strong prima facie *case against him—Procedure to be adopted—Court's decision to be final in such circumstances.*

The principle underlying S. 195, Criminal Procedure Code, is this. Where an act amounts to the offence of contempt of the lawful authority of public servants (Ss. 172-188, Indian Penal Code) or to an offence against public justice such as giving false evidence (S. 193, *et seq*, Indian Penal Code) or to an offence relating to documents actually used in a Court (S. 471, etc.) private prosecutions are barred absolutely, and only the Court in relation to which the offence was committed may initiate proceedings. This salutary rule of law is founded on common sense. The dignity and prestige of a Court of law must be upheld by its presiding officer and it would never do to leave it to the parties aggrieved, to achieve in prosecution gratification of personal revenge and vindication of a Court's honour and prestige. To allow this would be to sacrifice deliberately the dispassionate and impartial calm of tribunals, and to allow a Court's prestige to be the sport of personal passions.

In a suit on a pronote for Rs. 200 plaintiff applied for attachment before judgment of the defendant's movable property. The Court ordered notice to the defendant. As defendant did not appear in spite of notice having been personally served on him, attachment was ordered. When the bailiff went to attach the properties, the defendant paid up. The defendant complained that the indorsement of his signature on the back of the notice was forgery of his handwriting by the plaintiff's vakil's clerk. He therefore moved the Court to prosecute plaintiff's clerk and also filed a private complaint against him and also applied under S. 95, Civil Procedure Code for compensation against

* Cr. R. C. No. 213 of 1937.
Cr. R. P. No. 200 of 1937.

28th September, 1937.

Ramaswami Aiyangar *v.* Panduranga Mudaliar.

plaintiff. The Court declined to prosecute and dismissed the application for compensation. But the private complaint against plaintiff's vakil's clerk was taken cognizance of.

Held, that the offence alleged to have been committed by the clerk of the plaintiff's vakil was undoubtedly an offence against public justice, punishable under S. 193, Indian Penal Code, and possibly also under S. 199, Indian Penal Code. But when the Court had declined to prosecute, the defendant could not be allowed to prosecute merely because he felt that he had been personally dishonoured. The refusal to prosecute by Court was final.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Fourth Presidency Magistrate of the Court of the Presidency Magistrate, George Town, Madras, dated the 1st day of March, 1937, and passed in Calendar Case No. 2398 of 1936.

S. Panchapakesa Sastri and *N. Krishnamurti* for Petitioner.

K. Sankara Sastri and *A. K. Muthuswami Aiyar* for Respondent.

K.V. Ramaseshan for *The Crown Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—This is an application asking the Court to revise an order of the Fourth Presidency Magistrate made in the following circumstances.

In a suit on a pronote for Rs. 200, plaintiff applied for attachment before judgment of the defendant's movable property. The Court ordered notice to defendant. The notice was returned with an endorsement that it had been personally served on defendant. As defendant did not appear attachment was ordered. As soon as the bailiff went to effect attachment, the defendant paid up.

The defendant complains that his signature on the reverse of the notice was forged by the clerk of plaintiff's Advocate and the forged document was used to stifle his objections to attachment before judgment.

The defendant, after about a month's delay, moved the Court to prosecute the clerk of plaintiff's vakil and also filed a private complaint against him and also applied under S. 95, Civil Procedure Code, for compensation against plaintiff for attachment before judgment without reasonable and probable cause.

The Court declined to prosecute the plaintiff's vakil's clerk on 11th January, 1937, and dismissed the application for compensation under S. 95, Civil Procedure Code, on 17th December, 1936. But the defendant's private complaint against the plaintiff's vakil's clerk has been taken cognisance of. This petitioner requests that the order of the Fourth Presidency Magistrate deciding to go on with this private case should be revised.

The principle underlying S. 195, Criminal Procedure Code, is plainly this. Where an act amounts to the offence of contempt of the lawful authority of public servants (Ss. 172-188, Indian Penal Code), or to an offence against public justice such as giving false evidence (S. 193, *et seq*, Indian Penal Code) or to an offence relating to documents actually used in a Court (S. 471, etc.) private prosecutions are barred absolutely, and only the Court in relation to which the offence was committed may initiate proceedings. This salutary rule of law is founded on common sense. The dignity and prestige of Courts of law must be upheld by their Presiding Officers, and it would never do to leave it to parties aggrieved to achieve in one prosecution gratification of personal revenge and vindication of a Court's honour and prestige. To allow this would be to sacrifice deliberately the dispassionate and impartial calm of tribunals, and to allow a Court's prestige to be the sport of personal passions.

The offence alleged to have been committed here by the clerk of the plaintiff's vakil is undoubtedly an offence against public justice, punishable under S. 193, Indian Penal Code and possibly also under S. 199, Indian Penal Code. The Court in its discretion has declined to prosecute on the ground that there was not a strong *prima facie* case and that no prosecution at all is far better than a prosecution which is likely to prove abortive.

The defendant cannot be allowed to prosecute merely because he feels that he has been personally dishonoured. It is not indeed clear how such a prosecution can vindicate his honour. The refusal of the Court to prosecute is final. It must mean that there should be no prosecution at all for this alleged offence. The complainant, who is animated by a sense of personal grievance, cannot be allowed or trusted to be an impartial advocate and deputy of the Court in the role of prosecutor.

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I allow this petition. The complaint is dismissed as barred by S. 195 (*b*), Criminal Procedure Code.

K. C. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE VARADACHARIAR.

K. A. Dawood Sahib .. *Appellant* (1st Defendant)*

v.

V. A. Sheik Mohideen Sahib and another .. *Respondents (Plaintiff and 2nd Defendant).*

Dawood Sahib v. Sheik Mohideen Sahib.

Indian Partnership Act (IX of 1932), S. 17 (a)*—Partnership between two persons—Agreement to take shares in different proportions—Son of one of the partners succeeding to the father's place in the firm after the death of the father—Business continued—Dissolution—Claim of share according to the original ratio agreed upon—Valid.*

The father of the plaintiff and the first defendant entered into a partnership on the 14th April, 1920. The plaintiff's father died on 10th April, 1931, which meant in law the dissolution of the partnership. The business was carried on by the plaintiff, who stepped into his father's shoes, and the first defendant. The partnership went on till 1933 when the first defendant gave notice to the plaintiff to dissolve the partnership. When the original partnership was formed the partners had agreed to share equally in profits. But in 1922 plaintiff's father and defendant agreed that plaintiff's father should be deemed to have a share of 9½ annas and the defendant a share of 6½ annas. This meant sharing of losses and profits also in that ratio. On the contention by the defendant (appellant) that in regard to the business subsequent to April, 1931, the account should be taken on the basis that parties were entitled to share equally in the partnership profits.

Held, that the case was governed by S. 17 (*a*) of the Indian Partnership Act for though there had been a change in the constitution of the firm when the plaintiff and defendant continued the partnership, still the mutual rights and duties of the partners in the reconstituted firm having remained the same as they were immediately before the change, the plaintiff was entitled to the share of his father on the basis of 9½ share of the firm.

Appeal from the judgment of the Hon'ble Mr. Justice Gentle, dated 12th October, 1936 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 485 of 1933.

W. V. Rangaswami Aiyangar for Appellant.

C. Srinivasachari and *V.S. Arunachalam* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal arises out of a suit filed by the first respondent on the original side of this Court. The

* O. S. A. No. 3 of 1937. 3rd August, 1937.

Dawood Sahib *v.* Sheik Mohideen Sahib.

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appellant was the first defendant. The suit was for the taking of the accounts of a partnership between the plaintiff and the first defendant.

It appears that the father of the plaintiff and the first defendant entered into partnership on the 14th April, 1920. On the 10th April, 1931, the plaintiff's father died, which meant in law the dissolution of the partnership. The partnership business was, however, carried on by the plaintiff (who took the place of his deceased father), and the first defendant. This partnership carried on business until 1933 when the first defendant gave notice to the plaintiff dissolving the partnership. When the original partnership was formed, that is, the partnership between the plaintiff's father and the first defendant, it was agreed that they should share equally in the profits. They had each contributed a sum of Rs. 250 towards the capital. The plaintiff's father, however, was not satisfied with a division of profits on this basis, and on the 16th November, 1922, it was agreed between the plaintiff's father and the first defendant that the plaintiff's father should be deemed to have a share of $9\frac{1}{2}$ annas and the first defendant a share of $6\frac{1}{2}$ annas. This, of course, meant sharing both the losses and profits in these proportions. At an early stage in the original partnership, partnership moneys were advanced on mortgage. Two sums were in fact so advanced on the same property—a sum of Rs. 2,500 and another of Rs. 1,900. The mortgagors were unable to redeem the mortgages and were eventually compelled to convey the mortgaged property to the two partners in consideration of the mortgage debt *plus* a small monetary payment. The learned trial Judge gave the decree asked for and held that the profits and losses should be shared between the plaintiff and the first defendant on the basis of $9\frac{1}{2}$ annas and $6\frac{1}{2}$ annas respectively and that they were entitled to share in these proportions the property which they had bought. The appeal is concerned with these findings.

The appellant says that in regard to the business subsequent to April, 1931, the account should be taken on the basis that the parties were entitled to share equally in the partnership profits and that the house property also should be divided on this basis. The learned Advocate for the appellant rightly abandoned the contention with regard to the house on having his attention drawn to the provisions of S. 48 of the Indian

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Partnership Act, and, therefore, it is only necessary to discuss whether he is entitled to succeed on the other point.

In the trial Court the plaintiff contended that he was entitled to have the accounts taken on the basis that he had a share of 9½ annas on the ground that this had been expressly agreed. The first defendant similarly set up an express agreement to share equally. The learned Judge disbelieved the evidence of both the plaintiff and the first defendant and held that there was no express agreement at all. The parties had merely agreed to carry on the partnership business, the plaintiff taking the place of his deceased father and nothing being said about the shares. On this finding he held that the plaintiff was entitled to the share of his deceased father, and we consider that this decision is correct.

The learned Advocate for the appellant has relied on the provisions of S. 13 of the Indian Partnership Act. Cl. (*b*) of that section states that the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm. But the provisions in this section are all governed by the opening words of the section which are, " subject to contract between the partners ". If there was no agreement between the parties and a new partnership was formed the partnership would be governed by this section. But here we are dealing with a case where an established partnership business was continued on the same lines as before, after one of the partners had died, and S. 17 has application. That section says:

" Subject to contract between the partners—

(*a*) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be;

(*b*) where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will; and

(*c*) where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings, are the same as those in respect of the original adventures or undertakings."

There was no special contract between the parties when the plaintiff and the first defendant decided to continue the old business, but a change had occurred in the constitution of the firm. In these circumstances the Act contemplates that the rights and duties of the partners in the reconstituted firm shall

remain unchanged. There is no doubt that from 1922 up to the time of his death the plaintiff's father was entitled to a share of 9½ annas, and we consider that in the circumstances of this case his son is entitled to a division on the same basis.

The appeal will therefore be dismissed with costs.

K. C. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD RUSSELL OF KILLOWEN, LORD MACMILLAN AND SIR JOHN WALLIS.

The Tata Hydro-Electric Agencies, Ltd., Bombay .. *Appellants**

v.

The Commissioner of Income-tax, Bombay Presidency and Aden .. *Respondent.*

Revenue—Income-tax—Agency business acquired by assignee subject to obligation to make certain annual payments out of commission earned—Deduction of payments in computing profits—Whether permissible—Indian Income-tax Act (IX of 1922), S. 10.

A limited company, *A*, carried on an agency business in the course of which *inter alia* it acted as managing agent for a company, *B*. As remuneration, the *A* company received annually from the *B* company ten per cent. of the *B* company's profits for the year. The *A* company had acquired its agency business, including its rights under its agreement with the *B* company, by assignment from another company, subject to an obligation to pay to each of two parties, *X* and *Y*, twelve and a half per cent. of the annual commission which it received from the *B* company. That obligation had been undertaken by the *A* company's predecessors, the assignors, in consideration of loans made by *X* and *Y* to the *B* company at a time when the latter was urgently in need of financial assistance. On a claim by the *A* company to be allowed to deduct the twenty-five per cent. paid to *X* and *Y* in computing its profits and gains for a year of assessment,

Held that, those payments not being payments incurred solely for the purpose of earning profits, the deduction was inadmissible, and the fact that the payments affected the ultimate yield in money of the assessee company's business was irrelevant, that yield not being the statutory criterion.

Where the purchaser of a business undertakes to the vendor as one of the terms of the purchase that he will pay a sum annually to a third party, irrespective of whether the business yields any profits or not, it would be difficult to say that the annual payments thus made were incurred solely for the purpose of earning the profits of the business.

Pondicherry Railway Co., Ltd. v. *Commissioner of Income-tax, Madras,* (1931) 61 M.L.J. 251: L.R. 58 I.A. 239: I.L.R. 54 Mad. 691 (P.C.), distinguished.

C. Macdonald & Co. v. *Commissioner of Income-tax, Bombay,* (1934) 37 Bom.L.R. 126: 7 I.T.C. 466, explained.

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Dicta in *Robert Addie and Sons' Collieries, Ltd.* v. *Commissioners of Inland Revenue,* (1924) S.C. 231, approved.

Decision of the Bombay High Court affirmed.

Appeal from a judgment of the High Court of Judicature at Bombay (Beaumont, C.J. and Rangnekar, J.) delivered on a reference to the High Court under S. 66 of the Indian Income-tax Act by the Commissioner of Income-tax, Bombay Presidency and Aden.

The appellant company were assessed to income-tax for the year 1933 to 1934 in respect, *inter alia,* of the profits of their business of managing agents. In computing the profits of their business under S. 10 of the Act of 1922, the Income-tax Officer included the whole of the remuneration received by them by way of commission under their agency agreement from the Tata Power Co., Ltd. The appellants having appealed to the Assistant Commissioner, the latter rejected the appeal, holding that the case did not come within the principle of the decision of the Privy Council in *Raja Bijoy Singh Dudhuria* v. *Commissioner of Income-tax, Calcutta*[1], relied on by the appellants. The appellants being dissatisfied with the Assistant Commissioner's decision, he referred the questions of law set out in the judgment to the High Court under S. 66 of the Act. The High Court answered those questions adversely to the assessee company, which now appealed.

Raymond Needham, K.C., R. P. Hills and *R. Parikh* for Appellants.—The payments made by the appellants to F. R. Dinshaw, Ltd., and Mr. Tilden Smith ought not to have been taken into account in computing the profits of the appellants' business as managing agents for the purpose of income-tax, for those payments were not and did not represent part of the profits of the appellants' business. They were payments out of the gross revenue received by the appellants from one of the sources of revenue of the business, namely, a particular agency for a particular principal. Under the assignment to them of the agency business of Tata Sons, Ltd., the appellants obtained not the whole commission payable by the Tata Power Co., Ltd., to their agents, but only 75 per cent. of that commission. In any event, the payments were an expenditure necessary to enable the appellants to carry on their business as managing agents and earning the profits of the business. That the payments were expenditure necessary for the earning of the profits of their agency business is shown by the finding of fact in the case that the assignors, Tata Sons, Ltd., had been required to find persons willing to lend money to their principals, the Tata

1, (1933) 65 M.L.J. 285: L.R. 60 I.A. 196: I.L.R. 60 Cal. 1029 (P.C.),

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Power Co., Ltd., and that they had been obliged to undertake to pay to the lenders a share in their own commission from their principals.

Hubert Hull for Respondent.—The liabilities in discharge of which the appellants made the payments to F. E. Dinshaw, Ltd. and Tilden Smith were undertaken by the appellants as part of the consideration for the acquisition by it of its business as managing agents of the Tata Power Co., Ltd. Those payments were accordingly not expenditure incurred, whether solely or at all, for the purpose of earning the profits or gains brought under charge.

12th March, 1937. Their Lordships' judgment was delivered by

Lord Macmillan.

LORD MACMILLAN.—The appellants are a private limited company who carry on the business of managing agents of the Tata Power Company Limited and of certain other hydro-electric companies in India. They acquired this agency business from their predecessors, Tata Sons Limited, under an assignment dated the 21st November, 1929, whereby Tata Sons Limited transferred to the appellants their whole rights and interest as agents of the hydro-electric companies under their subsisting agreements with these companies, but subject, as to their rights and interest under their agreement with the Tata Power Company Limited, to their obligations under two agreements with F. E. Dinshaw Limited and Richard Tilden Smith respectively. The assignment was declared to be to the intent that the appellants should thenceforth be and act as the agents of the hydro-electric companies, and be entitled to all benefits and advantages contained in and conferred by the agreements between Tata Sons Limited and these companies, and should perform and be bound by all the obligations and duties thereby imposed, and further that the appellants should receive all commissions and other remuneration to which Tata Sons Limited were entitled thereunder. The appellants for their part covenanted to carry out and perform the terms and conditions of the agreements with F. E. Dinshaw Limited and Richard Tilden Smith, and to indemnify Tata Sons Limited against any consequences of the non-observance of those terms. They further undertook, if so required, to enter into separate agreements in their own names with F. E. Dinshaw Limited and Richard Tilden Smith in the same terms.

Under the agency agreement between Tata Sons Limited and the Tata Power Company Limited, which was dated the

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24th September, 1919, and the benefit of which the appellants thus acquired, the remuneration of Tata Sons Limited for their services consisted of a commission of 10 per cent. on the annual net profits of the Tata Power Company Limited, with a minimum of Rs. 50,000 whether that company should make any profits or not, and they were also entitled to have their expenses reimbursed. In return for this remuneration Tata Sons Limited undertook to use their best endeavours to promote the interests of the Tata Power Company Limited. The agreement was declared to be assignable, and the Tata Power Company Limited undertook to recognise any assignees as their agents and, if required, to enter into an identical agency agreement with such assignees. It was also declared to be lawful for Tata Sons Limited to assign the whole or any part of their earnings under the agreement.

It appears that in 1926 the Tata Power Company Limited were urgently in need of financial assistance to the extent of over a crore of rupees. Tata Sons Limited, their then managing agents, who, as the Commissioner of Income-tax puts it in his statement of facts, "had to find the money", approached F. E. Dinshaw Limited and Richard Tilden Smith, who agreed to provide the necessary funds. One of the conditions on which they agreed to do so was that, in addition to the interest payable by the Tata Power Company Limited for the loan, they should each receive from Tata Sons Limited two annas in the rupee, or $\cdot 12\frac{1}{2}$ per cent. of the commission earned by Tata Sons Limited under their agency agreement with the Tata Power Company Limited. Two agreements embodying this obligation were entered into between Tata Sons Limited and F. E. Dinshaw Limited and Richard Tilden Smith respectively, dated 15th and 19th October, 1926, being the agreements referred to in the assignment by Tata Sons Limited of their agency business to the appellants. It will be observed that, as the remuneration of Tata Sons Limited depended, subject to a minimum, on the prosperity of the Tata Power Company Limited, they had an interest in assisting the Tata Power Company Limited to obtain the financial accommodation required for the conduct of their business.

After the acquisition of the agency business by the appellants, the Tata Power Company Limited, in fulfilment of their obligation under their agreement with Tata Sons Limited,

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entered into a new agency agreement with the appellants dated the 17th December, 1929, in terms identical with those of their previous agreement with Tata Sons Limited, and the appellants also entered into agreements with F. E. Dinshaw Limited and the administrator of the estate of Richard Tilden Smith (who had meantime died), dated 23rd February, and the 19th May, 1932, respectively, in terms identical with those of the previous agreements between Tata Sons Limited and these parties.

By this series of transactions complete novation was effected, with the result that the appellants came in room and place of Tata Sons Limited in all respects as regards both the right to receive from the Tata Power Company Limited the stipulated agency remuneration and the obligation to pay out of that remuneration 12½ per cent. to F. E. Dinshaw Limited and 12½ per cent. to Richard Tilden Smith's administrator.

In the year 1932 the appellants' duly earned and received payment from the Tata Power Company of their commission of 10 per cent. on the net profits of that company and duly paid over to F. E. Dinshaw Limited and to Richard Tilden Smith's administrator 12½ per cent. thereof each, or 25 per cent. in all.

The assessment of the appellants' income for tax purposes for the fiscal year to the 31st March, 1934, which is in question in the present appeal, is based on their income, profits and gains for the year 1932, and the question is whether, in the computation for tax purposes of their income, profits and gains for that year, they are entitled to deduct a sum representing the 25 per cent. of the commission earned and received from the Tata Power Company Limited which they paid over to F. E. Dinshaw Limited and Richard Tilden Smith's administrator under the agreements above mentioned. The gross commission received by the appellants was Rs. 5,17,288 and the one-fourth of it which they claimed to deduct was Rs. 1,29,322.

Under S. 10 (2) of the Indian Income-tax Act, 1922, the profits or gains of any business carried on by the assessee are to be computed after making allowance for "IX. any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

The Income-tax Officer refused to allow the appellants to deduct the sum in question in the computation of the profits or gains of their business, and the Assistant Commissioner took

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the same view. The appellants then requested the respondent to refer to the High Court the legal question of the admissibility of the deduction. The respondent, in doing so, expressed, as required by S. 66 of the Act, his own opinion, which was also to the effect that the deduction was inadmissible. He founded his opinion on *Pondicherry Railway Company, Limited* v. *Commissioner of Income-tax, Madras*[1], which, he submitted, was on all fours with the present case, and he also referred to *Bharat Insurance Company* v. *Commissioner of Income-tax, Lahore*[2], in which the *Pondicherry* case was followed.

The questions of law as formulated by the Commissioner of Income-tax were as follows:—

(1) Whether in the circumstances of the case and in view of the provisions of Ss. 4 (1) and 10 of the Act, the assessee company has been correctly assessed on the total amount of Rs. 5,17,288 received by it as profits and gains of the business carried on by it as the managing agents of the Tata Power Co., Ltd.

(2) Whether under the provisions of S. 10 of the Act or under any other provision thereof the assessee company is entitled to have a deduction from the said profits and gains amounting to Rs. 5,17,288 to the extent of Rs. 1,29,322 paid by it to certain parties under the agreements, Exs. F and G [being the agreements between the appellants and F. E. Dinshaw Limited and Richard Tilden Smith's administrator respectively] on the ground that this latter amount was nothing but expenditure incurred solely for the purpose of earning the said profits or gains or on any other ground.

In the High Court the appellants were also unsuccessful. The Chief Justice, Sir John Beaumont, in his judgment held that the whole 10 per cent. commission received by the appellants from the Tata Power Company Limited was properly included without deduction in the assessment of the profits or gains of the appellant's business, in conformity with the decision in *C. Macdonald & Co.* v. *Commissioner of Income-tax, Bombay*,[3] within which the learned Chief Justice said that the present case exactly fell. He further expressed the opinion that the question whether the expenditure in question was incurred solely for the purpose of earning the profits or gains of their business was a question of fact, and that, as there was no finding of fact on which the Court could hold that the deduction claimed was one falling within the statute, the

1. (1931) 61 M.L.J. 251: L.R. 58 I.A. 239: I.L.R. 54 Mad. 691 (P.C.).
2. (1933) 66 M.L.J. 391: L.R. 61 I.A. 41: I.L.R. 15 Lah. 224 (P.C.).
3. (1934) 37 Bom. L.R. 126: 7 I.T.C. 466.

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question must be answered in the negative. By their order of the 27th March, 1935, the High Court accordingly answered the first of the questions stated by the Commissioner in the affirmative and the second in the negative.

In the case of *C. Macdonald & Co.* (*supra*) to which the learned Chief Justice refers, the assessees carried on the business of managing agents of another company from whom they received a commission for their services. This commission the assessees were bound under an agreement to share with certain third parties, and they claimed that the shares of their commission which they paid over to these third parties should be excluded or deducted in the computation of the profits or gains of their agency business. The Court held that the case was governed by the decision in the *Pondicherry* case (*supra*) and that the whole commission received by the assessees must be included without deduction in the computation of their income for tax purposes.

Before their Lordships counsel for the Crown did not seek to support the judgment of the High Court in the present case on the ground that it was ruled by the decision in the *Pondicherry* case (*supra*) and in their Lordships' view he was well-advised in recognising the clear distinction between that case and the present case. In the *Pondicherry* case the assessees were under obligation to make over a share of their profits to the French Government. Profits had first to be earned and ascertained before any sharing took place. Here the obligation of the appellants to pay a quarter of the commission which they receive from the Tata Power Company Limited to F. E. Dinshaw Limited and Richard Tilden Smith's administrator is quite independent of whether the appellants make any profit or not. Indeed, if on their year's operations as a whole they were to make a loss and incur no liability to income-tax, they would nevertheless have to pay away a quarter of the commission in question to the parties named. The commission in truth is not profit or gain; it is only an item or factor in the computation of the appellants' profits or gains. Their Lordships regard this as a fundamental distinction. In the case of *C. Macdonald & Co.* (*supra*) it would rather appear that the commission which was received by the assessees and which they were bound to share with certain other parties was the sole source of income of the

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assessees, but, be this as it may, the decision in that case cannot be supported by the authority of the *Pondicherry case* (*supra*) on whatever other ground it may be justified.

It was not questioned by counsel for the Crown that, if the present question had arisen with Tata Sons Limited, they would, under S. 10 (2) (ix), have been entitled on the facts stated to deduct their payments to F. E. Dinshaw Limited and Richard Tilden Smith as being expenditure incurred solely for the purpose of earning their profits or gains. But he submitted that, after the acquisition of the agency business by the present appellants, the payments assumed a different character. The appellants, he said, did not take any part in obtaining the loans nor did they incur the liabilities in question in the course of rendering any services to their principals. The obligation to make the payments in question was taken over by them as part of the transaction whereby they acquired the agency business from Tata Sons Limited and the payments were therefore made not for the purpose of earning profits in the conduct of the agency business but in fulfilment of the terms on which they purchased the business.

Their Lordships recognise, and the decided cases show, how difficult it is to discriminate between expenditure which is, and expenditure which is not, incurred solely for the purpose of earning profits or gains. In the present case their Lordships have reached the conclusion that the payments in question were not expenditure so incurred by the appellants. They were certainly not made in the process of earning their profits; they were not payments to creditors for goods supplied or services rendered to the appellants in their business; they did not arise out of any transactions in the conduct of their business. That they had to make those payments no doubt affected the ultimate yield in money to them from their business, but that is not the statutory criterion. They must have taken this liability into account when they agreed to take over the business. In short, the obligation to make these payments was undertaken by the appellants in consideration of their acquisition of the right and opportunity to earn profits, that is of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business. If the purchaser of a business undertakes to the vendor as one of the terms of the purchase that he will pay a sum annually to a third party, irrespective of

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whether the business yields any profits or not, it would be difficult to say that the annual payments were made solely for the purpose of earning the profits of the business. It would seem to make no difference that the annual sum should be made payable out of a particular receipt of the business, irrespective of the earning of any profit from the business as a whole. The case of a transferee of a business undertaking liability, for example, for the rents under current leases of the premises in which the business was carried on by the transferor and is to be carried on by the transferee is quite a different case, for the rents paid are clearly an outlay necessary for the earning of profit. In *Robert Addie & Sons' Collieries, Ltd.* v. *Commissioners of Inland Revenue*[1] the Lord President Clyde, dealing with corresponding words in the British Income-tax Act, says at p. 235:

> "What is 'money wholly and exclusively laid out for the purposes of the trade' is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the company's working expenses; is it expenditure laid out as part of the process of profit earning?"

Adopting this test, their Lordships are of opinion that the deduction claimed by the appellants is inadmissible as not being expenditure incurred solely for the purpose of earning the profits or gains of the business carried on by the appellants. They thus reach the same result as the learned Judges of the High Court but on different grounds, and they would only add in conclusion that with all respect they do not share the view expressed by the learned Chief Justice that the question whether the payments in question were admissible deductions under S. 10 (2) (*ix*) was not open to argument in the High Court on the facts as found.

Their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed and the order of the High Court of 27th March, 1935, be affirmed. The respondent will have his costs of the appeal.

Solicitors for Appellants: *Stanley Johnson & Allen.*

Solicitors for Respondent: *The Solicitor, India Office.*

R. C. C. ——— *Appeal dismissed.*

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1. (1924) S.C. 231.

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD ALNESS, SIR SHADI LAL AND SIR GEORGE RANKIN.

Thakur Ganesh Bakhsh Singh and others .. *Appellants**

v.

Thakur Ajudhia Bakhsh Singh and others .. *Respondents.*

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Evidence—Pedigrees—Record of recent events—Statements being contradictory—Entry in wajib-ul-arz*—Evidentiary value as tradition.*

Where in a case of disputed succession the documentary evidence dates back to the year 1860, unless pedigrees drawn up *circa* 1860 can be shown to have been derived from earlier and more authentic documents the evidence which they afford would at best be evidence of tradition and in so far as the statements are interested or contradictory or disputed they rapidly lose value. The fact that in a *wajib-ul-arz* such a pedigree is given in the course of the account of the village history does not transmute it into something higher than tradition.

Where the tradition has been ascertained with reasonable certainty, a proper value must be given to it on questions of pedigree and it may be sufficient of itself; but the fact that a case is difficult of proof does not dispense with proper proof, and in many cases there is good reason to regard tradition as poor and treacherous material.

Decision of the Oudh Chief Court affirmed.

A. M. Dunne, K.C., L. M. D. DeSilva and *B. S. Srivastava* for Appellants.

W. Wallach for Respondents.

28th July, 1937. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—This is an appeal by the plaintiffs in a suit to establish their right to two taluqdari estates in Oudh against decrees dismissing the suit made in the Chief Court of Oudh by Pullan, J., at first instance (23rd December, 1929), and by Wazir Hasan, C.J. and Raza, J., on appeal therefrom (19th May, 1931). The estates in question ars called Simri and Patanti Dasi and comprise 42 villages in the districts of Rae Bareli and Unao. At the Second Summary Settlement (1859) and the Regular Settlement (1861) these estates were settled with one Jagannath Bakhsh to whom a sanad was granted on 28th November, 1861; and they were entered in Lists I and II prepared in accordance with the provisions of S. 8 of the Oudh Estates Act (I of 1869). Jagannath died on 3rd November, 1869, aged about 15 years and was succeeded

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* P. C. Appeal No. 26 of 1935. 28th July, 1937.
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by his widow Sheopal Kuer who died in 1886 and thereafter by his mother Parsan Kuer who died in 1922. The appellants' case is that on her death Har Charan Singh (father of the principal appellant Ganesh Bakhsh Singh) became entitled to the taluqas as the nearest male agnate of Jagannath according to the rule of lineal primogeniture. The appellants other than Ganesh are transferees from him under a deed of 1928. The suit was brought on 17th January, 1929, after the death of Har Charan Singh.

For the proposition that on the death in 1922 of Parsan Kuer, Jagannath's mother, the estates descended to his nearest male agnate according to the rule of lineal primogeniture, the appellants rely upon the tenth clause of the section which by S. 14 of the Oudh Estates (Amendment) Act, 1910, was substituted for S. 22 of the original Act (I of 1869). For the first respondent, it is denied that this clause is applicable to the present case, and it is further contended that the suit is barred by limitation in respect that in 1886 succession to the estate was governed by the sanad of 1861, and the possession of Parsan Kuer was accordingly without right and adverse to the title now sued on. Their Lordships do not find it necessary to enter into either of these defences, as they consider, in agreement with both Courts in India, that the plaintiff-appellants have failed to prove the pedigree of Har Charan Singh so as to establish that he was in 1922 the nearest male agnate of Jagannath according to the rule of lineal primogeniture.

In reaching this conclusion their Lordships have regarded the first respondent Raghuraj merely as a person in possession entitled as such to insist that the appellants can only eject him on the strength of their own title and by proper proof thereof. If the pedigree put forward by the appellants is worthy of any credence, the first respondent cannot claim to be the nearer agnate of Jagannath on principles of primogeniture. Parsan claimed that Sheopal had adopted him as a son to Jagannath; but, this claim having failed, he stands only as the grandson of one Shanker Bakhsh hereinafter mentioned as a descendant of Lohang Rai son of Bal Singh Rai. Again it would be unjust to regard the appellants' claim in this case as of a dishonest or fabricated character: they have given sufficient proof of a large part of the pedigree which they propound and need be subjected to no special degree of suspicion. In the third place,

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their Lordships have not thought it right to proceed merely by applying the rule of practice which ordinarily exempts concurrent findings of fact from being challenged before the Board. Learned counsel for the appellants went fully into all the questions of fact which he desired to raise as well as into certain questions of law which are inter-related therewith and difficult to separate therefrom. That great weight is in the present case to be attached to the findings of the Indian Courts is a conclusion which the Board have reached upon a full and untrammelled examination of the materials on the record: not as a method of procedure or as a bare presumption, but as due to the great care and acumen of the judgments, and to the nature of the evidence and subject-matter which call for the most careful appreciation of Indian conditions.

The appellants' criticism of the Courts in India is not that upon inadequate evidence they have held certain things to be proved which are untrue, but that they have not been satisfied by the proof adduced of certain steps in the pedigree relied upon. Their Lordships are asked to say that they ought to have been satisfied: misconception or mistake, if shown, may well justify such a view, but otherwise it is a difficult criticism to make good in a case which calls for caution.

The pedigree table herein set forth is designed to show the case made by the plaintiff-appellants and the names which have been underlined are those as to which the Courts in India have not been satisfied by the evidence adduced. It will be seen that the appellants connect Har Charan Singh (father of appellant No. 1) with Jagannath (the last full owner of the taluqas) through a common ancestor Bal Singh Rai: they have traced Har Charan's ancestry up to Pirthi Singh and Jagannath's up to Doman Deo who was a son of Bal Singh; but they have not satisfied the Courts in India that Kharag Rai was the eldest son of Bal Singh Rai, nor that he had no natural son, nor that he adopted Sheo Prasad, nor that Sheo Prasad was a son of Doman Deo or Kharag Rai, nor that Bakht Bali was the eldest son of Sheo Prasad; nor that Pirthi Singh was the eldest son of Bakht Bali. As the oral evidence given at the trial is no longer relied upon by either side for the present purpose and as the documentary evidence dates from 1860 or thereabouts, it is as well to have some notion of the dates of Kharag Rai and his alleged succes-

BALSINGH RAI, *alias* HAR MANSUKH RAI.

- *Kharag Rai.*
  - *Sheo Prasad Singh* (adopted son)
    - *Bakhat Bali.*
      - Pirthi Singh.
        - Gajraj Singh.
          - Ajit Singh.
            - Gurdat Singh.
              - Jagmohan Singh.
                - Harcharan Singh.
                  - Ganesh Bakhsh Singh. (Plaintiff No. 1.)
          - Zalim Singh.
            - Mahpal Singh (descendants living).
      - Daryao Singh.
        - Chandrapati Singh.
          - Dirgaj Singh.
            - Jagpat Singh.
          - Narpat Singh (descendants living).
        - Raghunath Singh.
          - Jagatpal Singh and three others.
            - Bikarmajit Singh.
        - Sarabjit Singh (descendants living).
      - Phair Singh.
    - Fateh Bahadur.
- Doman Deo.
  - *Sheo Prasad Singh* (adopted by Kharag Rai).
  - Debi Singh=Parsan Kuar (died 1922).
    - Jagannath Baksh Singh=Sheopal Kuar (died 1886). (Jagannath Baksh Singh died 3-11-1869). (Taluqdar in the 5th generation.)
- Lohang Rai. (Defendant Nos. 1, 2 and 3 belong to this branch.)

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sors. On the view put forward by the appellants, plaintiffs' Ex. 77, a sanad dated 1167 Hijri (A.D. 1745) may be taken for this purpose. It shows Bhikam as being then the taluqdar of Simri and Bakht Bali as the chief revenue payer of mauza Bakulhia. If either be taken as born *circa* 1710, his grandfather's birth would not be much later than 1670 and might be much earlier. The *wajib-ul-arz* of Chak Gajraj (Ex. 6) of 1870 gives Kharag Rai's date as "about 400 years ago," that of Deoli (Ex. 7) c. 1867 as "about 125 years ago," that of Ramwanpur Dubai (Ex. 117) of 1864 as "about 200 years ago." In any view unless pedigrees drawn up *circa* 1860 can be shown to have derived from earlier and more authentic documents the evidence which they afford is at best evidence of tradition: in so far as the statements are interested or contradictory or disputed they rapidly lose value. The fact that in a *wajib-ul-arz* such a pedigree is given in the course of the account of the village history does not (necessarily, at least) transmute it into something higher than tradition: and the *wajib-ul-arzes* in the present case have only to be read to demonstrate the soundness of what Mr. Ameer Ali said to that effect in *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan*[1] and of the view taken by the trial Judge in the present case. Where the tradition has been ascertained with reasonable certainty, a proper value must be given to it on questions of pedigree, and it may be sufficient of itself: but the fact that a case is difficult of proof does not dispense with proper proof, and in many cases there is good reason to regard tradition as poor and treacherous material.

A question of admissibility arises as to certain of the documents relied on by the appellants. In *Rai Jagatpal Singh* v. *Raja Jageshar Baksh Singh*[2] the Board rejected a document which was proved to have been made an exhibit by one Gurdat in a suit for certain villages. Lord Robertson said: "The fatal objection to the admissibility of the document is that it is in no way brought home to Gurdat except as being an exhibit binding on him for the purposes of that suit. His relation to the document is therefore something entirely different from the personal knowledge and belief which must be found or presumed in any statement of a deceased person which is admissible in evidence."

1. (1916) 31 M.L.J. 804: L.R. 43 I.A. 269 at 282: I.L.R. 38 All. 552 (P.C.).
2. (1902) L.R. 30 I.A. 27 at 34: I.L.R. 25 All. 143 (P.C.).

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Upon this principle documents on both sides are in a position of considerable doubt, for example, Ex. 204 the pedigree filed on behalf of Shanker Bakhsh (1867) Ex. A 419 and Ex. 2, the statement and pedigree filed by Bikarmajit (1867) and B. 1 the pedigree sent up to Government in the name of the minor taluqdar in 1860. There is room also for some dispute as to the application of the restriction imposed by the words, in S. 32 of the Indian Evidence Act, "when the statement was made before the question in dispute was raised," and on the question whether opinions expressed by Settlement Officers are to be regarded as " judgments " or as entries under S. 35 of the Act. Their Lordships are satisfied, however, that the result of the evidence in the present case cannot be appreciably affected by any criticism of the Chief Court's views upon the admissibility of particular documents: indeed in every case of doubt the learned Judges have given a careful estimate of the value of the document as evidence assuming it to be admissible.

The appellants' case clearly cannot stand unless the Chief Court's criticism of the documents upon which they rely can be held to be misconceived or unduly harsh. The nature of the evidence is such as to have substantial value only if the statements of tradition can be seen to be an expression of the information possessed by persons having special means of knowledge at a time when they had no interest to serve one way or another and were not taking sides as to any matter then in controversy. From this standpoint their Lordships think it wholly impossible to insist upon any Court of law regarding as reliable the pedigrees put forward by Bikarmajit in the various documents which emanated from him in the sixties or the nineties of last century. That he was interested and by no means above attempting to adapt his case to suit his interests is only too clear; that he satisfied some Government officers that he belonged to a branch of the family senior to that of the taluqdar is true, but it gives small assurance of the correctness of his statements on the critical points. The appellants' case as to Sheo Prasad is an alternative case: they say first that Kharag Rai adopted him and alternatively that he was the natural son of Doman Deo Kharag's young brother. The first —not to say the only—suggestion of this alleged adoption is in a document of 1867 put forward by Shanker Bakhsh in support of a claim against the taluqdar Jagannath for maintenance: even if the endorsement "filed by the plaintiff" be taken as sufficient

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to make it admissible, the pedigree is shown to have been falsified in at least one other particular and is in their Lordships' view rightly regarded by the Chief Court with suspicion.

The case that Kharag died sonless and that Sheo Prasad is the eldest son of Doman Deo is an inconsistent case and is but poorly supported by the evidence taken as a whole. The appellants are able to point to the fact that in 1890 when the first respondent was a minor Parsan Kuer as his guardian *ad litem* put forward a pedigree (Ex. 257) which showed Sheo Prasad as son of Kharag Rai and Pirthi Singh as elder brother to Daryao Singh. If this pedigree is admissible at all it would seem to be so only as an admission, and by reason of the fact that the first respondent came of age before the litigation of 1890 was finally disposed of. But the pedigree is plainly untrue on several matters and goes contrary to the appellants' case. That they should select particular points from it which favour their case may be permissible, but as evidence is not impressive. These observations refer to a few only out of many documents, but they are of primary importance in the case. Their Lordships do not find it necessary that they should refer specifically to each of the documents and to the comment made thereon by either side. They were taken in detail by Mr. Dunne in an elaborate and sustained argument through six pedigrees, nine *wajib-ul-arzes*, four reports by Settlement Officers, and three judgments, together with other papers bearing on the appellants' case. While fully appreciating the injustice that might be done to the appellant if the standard of proof be raised too high, their Lordships cannot but conclude, upon a review of the documentary evidence as a whole, that the careful criticism of the learned Judges in the Chief Court is sufficient to justify their refusal to hold the appellants' case established and demonstrates the interested, uninformed and inconsistent character of the evidence in favour of the tradition upon which the appellants rely. The links in the chain of descent which the Chief Court regard as weak are in their Lordships' judgment really weak. They will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for Appellants: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *Douglas Grant and Dold.*

R. C. C. —— *Appeal dismissed.*

B. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE ABDUR RAHMAN.

Sheik Muhammad Rowther and another ... *Appellants** (*Defendants*)

v.

Ayeesha Beevi declared major and guardian discharged (*vide* order dated 15th August, 1933, on C. M. P. No. 2210 of 1933) ... *Respondent* (*Plaintiff*).

Sheik Muhammad Rowther *v.* Ayeesha Beevi.

Mahomedan Law—Sunnis—Hanafi—Deed of dower—Silent as to whether whole or any portion of dower is prompt or deferred—Presumption that whole is prompt—Madras Presidency—No difference between Shiah and Sunni laws in this respect.

The decision in *Masthan Sahib* v. *Assan Bivi Ammal*, (1900) 10 M.L.J. 123: I.L.R. 23 Mad. 371 (F.B.), was intended to lay down and so far as this presidency is concerned, was understood to lay down the law for all Mahomedans, whether Shiahs or Sunnis and was not confined to Shias. At all events, it would be dangerous to go back upon or overrule the decision after such a long time.

Therefore where at the time of marriage of two Hanafi spouses belonging to Madras Presidency, the contract for the payment of dower, embodied in a deed of dower, did not fix any time for payment of either the whole or a portion of the dower, the whole is to be presumed to be prompt and payable on demand.

Decisions to the contrary effect of the Allahabad and Patna High Courts not followed.

Second appeal against the decree of the Court of the Subordinate Judge of Dindigul in Appeal Suit No. 59 of 1932, preferred against the decree of the Court of the District Munsiff of Palni in Original Suit No. 431 of 1931.

ORDER. *Venkataramana Rao, J.*—Three points have been argued by Mr. Rajah Aiyar in this second appeal, one relating to a question of fact and the other two relating to questions of law. The question of fact relates to the genuineness of Ex. F, which is the document on which the suit claim for dower is based. There is a concurrent finding of both the Courts that Ex. F is genuine, and it is not open to Mr. Rajah Aiyar to challenge it in second appeal.

The second point urged before me is that, as the contract, Ex. F, does not fix any time for payment of the dower, and as the parties are governed by Hanafi law, part of the dower must be

* S. A. No. 343 of 1933. 19th August, 1937.

Sheik Muhammad Rowther *v.* Ayeesha Beevi.

presumed to be prompt and part deferred, and that the view of the lower Court following *Hussein Khan Sardar Khan* v. *Gulab Khatum*[1] is not correct. It is admitted that the parties to this suit are Hanafis. The text writers on Muhammadan Law seem to make a distinction between the Shia law and the Hanafi law in regard to the payment of dower where the contract does not fix the time for payment. In Shia law the presumption seems to be that, in the absence of a contract fixing the time for payment, the dower is prompt and payable on demand; but in Hanafi law the presumption seems to be otherwise. In *Mussammat Bibi Mahbooban* v. *Sheikh Muhammad Ammeruddin*[2], Das, J., states the rule of law thus:—

> " It seems to be well-settled that amongst the Sunnis, where it is not settled at the time of the marriage whether the wife's dower is to be prompt or deferred, part will be prompt and part deferred, the proportion referable to each category being regulated by custom, or, in the absence of custom, by the status of the parties and the amount of dower settled."

According to the learned Judge, the presumption will apply even in a case where an agreement is set up but is not substantiated. This seems to be the view also of the Allahabad High Court in *Umda Begam* v. *Muhammadi Begam*[3]. But Mr. Panchapakesa Sastri contends that so far as this presidency is concerned no such distinction is drawn between Shia law and Hanafi law, and the Full Bench in *Masthan Sahib* v. *Assan Bivi Ammal*[4] must be deemed to have laid down the law for all Muhammadans. According to the said decision, unless payment of the whole or any part is expressly postponed, it must be presumed to be prompt and payable on demand. It is not clear from the judgment, or from a reference to the printed papers, whether the parties were Shias or Sunnis. In the argument of Mr. K. Srinivasa Aiyangar for the appellant before the Full Bench there is a statement to the effect that he contended that the parties were Shias. At any rate, both the Allahabad and the Patna High Courts are inclined not to treat that case as laying down any rule of Hanafi law, but that the principle of that decision must be confined to Shias. I may observe that the decision in *Masthan Sahib* v. *Assan Bivi Ammal*[4] purports to follow a decision of the Privy Council in *Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor*[5] where the parties were Shias. It is not clear from the Full Bench decision whether it is intended to govern all classes of Muhammadans, whether Shias or Hanafis. In view of

1. (1911) I.L.R. 35 Bom. 386.
2. (1929) I.L.R. 8 Pat. 645 at 649.
3. (1910) I.L.R. 33 All. 291.
4. (1900) 10 M.L.J. 123: I.L.R. 23 Mad. 371 (F.B.).
5. (1873) 19 W.R. 315 (P.C.).

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the decisions of the Allahabad and Patna High Courts which have taken a definite view on this matter, it is desirable that there should be an authoritative ruling whether the decision of the Full Bench in *Masthan Sahib* v. *Assan Bivi Ammal*[1] was intended to lay down the law for all Muhammadans, whether Shias or Sunnis. I accordingly refer the matter to a Bench for disposal.

The other point raised by Mr. Rajah Aiyar relates to the question of interest. This matter also will be disposed of by the Bench dealing with the second appeal.

K. Rajah Aiyar and *U. S. Ramaswami* for Appellants.

S. Panchapakesa Sastri and *K. R. Krishnaswami* for Respondent.

The Court delivered the following

JUDGMENTS. *Burn, J.*—The facts are all set forth in the judgment of my learned brother which I have had the advantage of perusing. Since I agree with his conclusions, it is not necessary for me to say more than a few words upon the subject for decision in this appeal. Burn, J.

The point upon which our learned brother Venkataramana Rao, J., felt some doubt was whether the Full Bench in disposing of the case in *Masthan Sahib* v. *Assan Bivi Ammal*[1] intended to lay down the law for all Muhammadans, whether Shias or Sunnis. If it did, there is no question about the binding nature of the decision so far as we are concerned, and since the decision is now 37 years old, I should be very reluctant to suggest that it requires reconsideration whatever the nature of the decisions in other provinces might be.

I do not think there is any room for doubt upon this matter. The order of reference to a Full Bench, which gave occasion for the decision reported in *Masthan Sahib* v. *Assan Bivi Ammal*[1] states simply that the parties were "Muhammadans". It goes on to state that this Court in the case of *Tadiya* v. *Hasanebiyari*[2] in 1870 held that:

"*According to Muhammadan law* dower is presumed to be prompt in the absence of express contract."

The ground of this decision was stated to be that:

"The authorities agreed that there was a *presumption of Muhammadan law* to this effect."

Later in the order of reference the learned Judges draw attention to Ameer Ali's work on Muhammadan law in

1. (1900) 10 M.L.J. 123: I.L.R. 23 Mad. 371 (F.B.).
2. (1870) 6 M.H.C.R. 9.

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which a distinction is made between the Shia law and the Hanafi doctrines. Nevertheless in the *opinion* delivered by the Full Bench there is no reference to any difference between Hanafi doctrine and Shia doctrine. It cannot be presumed that the learned Judges overlooked the reference to Ameer Ali's work and the only conclusion I can draw from their opinion is that they deemed themselves to be laying down the law for all Muhammadans irrespective of sect.

There is undoubtedly a divergence of view between Macnaghten and Baillie in those parts of their treatises in which they were propounding the principles of *Hanafi* law. There was not, I believe at any time, any question about the Shia doctrine on this point. According to Shia law, the whole dower is prompt when the contract is silent. I agree with my learned brother that the remark attributed to Mr. K. Srinivasa Aiyangar in the report of his argument in *Masthan Sahib* v. *Assan Bivi Ammal*[1]. "These parties are Shias" must be the result of incorrect reporting. If the parties had been Shias the contention put forward on their behalf could never have arisen. Macnaghten and Baillie differed. This Court in *Tadiya* v. *Hasanebiyari*[2] (which was a case affecting Shafis, that is, Sunnis) followed Macnaghten in preference to Baillie and their Lordships of the Privy Council in *Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor*[3] expressed the opinion that the view laid down in Macnaghten's principles was "the admitted rule". I am quite clear that we should do nothing now to indicate any doubt about the correctness of the decision in *Masthan Sahib* v. *Assan Bivi Ammal*[1]. On the question of interest no sufficient reason was shown for interference with the decree of the lower Court.

The appeal must be dismissed with costs.

Abdur Rahman, J.

Abdur Rahman, J.—This appeal arises out of a suit brought by one Ayeesha Bivi for the recovery of her dower amounting to Rs. 2,000 and for subsequent interest. The suit was filed on the basis of a deed of dower which was silent on the point whether the dower was prompt or deferred. It was alleged on behalf of the plaintiff, however that as the deed was silent

1. (1900) 10 M.L.J. 123: I.L.R. 23 Mad. 371 (F.B.).
2. (1870) 6 M.H.C.R. 9.
3. (1873) 19 W.R. 315 (P.C.).

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on the point, the dower should be presumed to be prompt and in any case there was a communal custom prevailing to that effect in the Nallampillai community. In answer to this claim, her husband defendant 2 pleaded that the deed filed on behalf of the plaintiff was a forgery and that a sum of 2,000 tangas only and not Rs. 2,000 (a tanga being 1/3rd of a rupee) was fixed as dower between the parties and was so entered in a document which had also provided that the whole of the dower was deferred in character. It was also pleaded that the aforesaid dower of 2,000 tangas, that is, Rs. 667 was, although deferred, already paid to the plaintiff. In the alternative it was pleaded that the plaintiff was not entitled to recover any mahar during the continuance of the Nikah and that there was no custom which would entitle her to claim it before dissolution of marriage.

Finding that the plea of payment raised on behalf of the defendants was not substantiated and that the deed of dower relied upon by the plaintiff was a genuine document, the trial Court did not give an explicit finding on the custom alleged on behalf of the plaintiff but referring to the question of law it was stated that the view taken by the Bombay High Court was probably the more correct view. He therefore found that the whole of the dower was payable on demand and decreed the claim.

Aggrieved by this order the defendants filed an appeal to the Subordinate Judge at Dindigul who went into questions of facts carefully but disposed of the question of law with a statement that according to the Bombay High Court, if the document was silent on the point when the dower was to be paid, it should be taken to be payable at once.

Not being satisfied with the orders of the trial and the lower appellate Courts, the defendants came up to the High Court. The appeal was heard in the first instance by my learned brother, Venkataramana Rao, J., who came to the conclusion that the genuineness of the deed of dower could not be challenged in the second appeal. But in view of a Full Bench decision of this Court given in *Masthan Sahib* v. *Assan Bivi Ammal*[1], which followed a decision of the Privy Council in *Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza*

1. (1900) 10 M.L.J. 123: I.L.R. 23 Mad. 371 (F.B.).

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Khurrum Bukht Yahya Ali Khan Bahadur[1] on the one hand and divergent views taken particularly by the High Courts of Allahabad and Patna in the rulings cited below on the other (*Eidan* v. *Mazhar Husain*[2], *Taufik-un-nissa* v. *Ghulam Kambar*[3], *Umda Begam* v. *Muhammadi Begam*[4] and *Mussammat Bibi Mahbooban* v. *Sheikh Muhammad Ammeruddin*[5]), he considered it desirable to refer the case for an authoritative ruling and the case has consequently been sent to a Bench of this Court for disposal. This was done particularly as some doubt existed on the question whether the Madras Full Bench case and the Privy Council case, both of which have been cited above, intended to lay down the law for all Muhammadans whether of Shia or Sunni persuasion or only for Muhammadans of the Shia sect alone. This doubt was natural as the Privy Council decision was given in the case of certain members of the ruling house of Oudh who were Shias and although there was nothing to show on the records of the Madras Full Bench case printed in *Masthan Sahib* v. *Assan Bivi Ammal*[6] that the parties were Shias, a statement has been printed as having been made by Mr. K. Srinivasa Aiyangar, Counsel for the appellant, that the parties to that suit were Shias. This is surprising as this statement is preceded by the words:

"Syed Ameer Ali in his work on 'Muhammadan Law,' Vol. II, at p. 386, draws a distinction between Shias and Hanafis."

If the Counsel for the appellant in that case were alive, as he must have been to the distinction pointed out by Syed Ameer Ali, which laid down that under the Shia law, where no time was specified for the payment of the dower or where its nature was described only in general terms and it was mentioned in the contract of marriage how much was prompt and how much deferred, the whole was to be considered as prompt. Mr. Srinivasa Aiyangar was contending for the appellant in that case that the dower in Muhammadan law, if not specified to be prompt, could not be presumed to be so. He is then stated to have cited in support of his contention the following words out of Baillie's Digest of Muhammadan Law:

"When the parties have explained how much of the dower is to be Moouijul or prompt, that part of it is to be promptly paid. When nothing has

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1. (1873) 19 W.R. 315 (P.C.).
2. (1877) I.L.R. 1 All. 483.
3. (1877) I.L.R. 1 All. 506.
4. (1910) I.L.R. 33 All. 291.
5. (1929) I.L.R. 8 Pat. 645.
6. (1900) 10 M.L.J. 123: I.L.R. 23 Mad. 371 (F.B.).

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been said on the subject, both the woman and the dower mentioned in that contract, are to be taken into consideration with the view of determining how much of such a dower should properly be prompt for such a woman and so much is to be Moonjjul or prompt, accordingly, without any reference to the proposition of a fourth or a fifth, but what is customary must also be taken into consideration."

If the parties to the suit were on the other hand Shias, Baillie's Digest of Muhammadan Law, Vol. I, which deals with the law amongst Sunnis, would not have been quoted at all particularly when the Counsel had, as pointed above, admitted that in the case of Shias, the presumption would be otherwise. It might be stated here that Baillie discusses the Imamea Law in the second volume of his work.

The contention that Mr. Srinivasa Aiyangar could not have made such a statement in *Masthan Sahib* v. *Assan Bivi Ammal*[1] was also supported by the Counsel for respondent by a reference to Wilson's Muhammadan Law, who has pointed out that an admission of that nature would have been fatal to the appellant's case (pages 118-119, 5th Edition). I have gone through the records of the case printed in *Masthan Sahib* v. *Assan Bivi Ammal*[1] and find nothing there which would show that the parties to the suit were Shias. In view of what has been said I have no hesitation in finding that the statement imputed to Mr. Srinivasa Aiyangar to the effect that the parties to that suit were Shias and printed at page 375 of the Indian Law Reports (*Masthan Sahib* v. *Assan Bivi Ammal*[1]) could not have been made by him. On the other hand a reference to the other authorities which were cited by the Division Bench in referring the case to the Full Bench for decision and those which were cited before the Full Bench leads me to conclude that the Full Bench was dealing with a case between persons who were of Sunni pursuasion and not those who followed the Imamea Law.

As for the decision given by their Lordships of the Privy Council in *Mirza Bedar Bukht case*[2] it is true that the parties to that suit must be presumed to have been Shias as the ruling family of Oudh was a Shia family. But a reference to the judgment in that case shows that their Lordships of the Judicial Committee did not, while considering this question, refer to Shia texts but to those which were applicable to

1. (1900) 10 M.L.J. 123: I.L.R. 23 Mad. 371 (F.B.).
2. (1873) 19 W.R. 315 (P.C.).

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Sunnis. There is nothing to show in fact that they intended to differentiate between the two schools of thought. The observations which they made in that case were wholly general in character. It would thus follow that the Full Bench case reported in *Masthan Sahib* v. *Assan Bivi Ammal*[1] is binding on us and is really based on the observations made by their Lordships of the Privy Council in *Mirza Bedar Bukht case*[2] in which they preferred to follow the law as laid down in Macnaghten's Principles and Precedents, Chapter 7, Art. 22, to the effect that:

"Where it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand."

Had the Full Bench case not been based on the law laid down by the Privy Council, it would have been necessary to consider whether in view of the pronouncements of the learned Judges of Allahabad and Patna High Courts based as they are on the dicta of learned authors like Baillie and Ameer Ali it would not be advisable to refer the case to another Full Bench. But in view of the conclusions arrived at by me, I don't feel called upon to do so. Moreover, while examining the original authorities referred to by Mr. Ameer Ali and Baillie, I came across an original text from Hammadeyah—a work of great authority and fully recognised to be so amongst the Sunni Mussalmans in India—in which the position of the law has been stated as described by Macnaghten in his Principl-s of Muhammadan Law. I find at page 89 of the first volum: of Hammadeyah (1825 Ed.).

(Written in Arabic language.)

*   *   *   *   *   *

Rendered into English, it would read as follows:—

"The dower is not free then from one condition and other. It would either be with a condition of immediate payment (that is, Mooujjil) or with a condition of its being deferred (Movajjal) or it may be silent. But if it is with a condition of immediate payment or is silent, it would become immediately payable (Muajjal) for it is a contract with consideration and is therefore required to be equal on both the sides. As the woman (wife) has established the husband's right, it is essential that he (husband) may establish hers and this would be established on payment."

The learned author then proceeds to refer to expressly deferred dower with which we are not concerned here.

1. (1900) 10 M.L.J. 123: I.L.R. 23 Mad. 371 (F.B.).
2. (1873) 19 W.R. 315 (P.C.).

Sheik Muhammad Rowther v. Ayeesha Beevi.

Abdur Rahman, J.

It is true that Mr. Ameer Ali has based his opinion on Fatawa Alamgiri which relies for its authority on a passage from Fatawa Kazi Khan. I have consulted both these original authorities and find that the statement of the law as given by them, has been correctly put down by Mr. Ameer Ali in his well-known work at page 499 (Vol. 2) and by Baillie in his Digest at page 127 (1875 Edn.).

But the fact remains that Hammadeyah lays it down differently and this view of law was propounded by Macnaghten and recognised by the Privy Council in *Mirza Bedar Bkhht case*[1] and followed subsequently by this High Court in *Masthan Sahib's case*[2].

This rule of law is more commendable. It makes it more exact and workable in practice and fits in with the advancing state of society which gives more rights to helpless ladies in getting what they do not generally get on account of their dower—a liability which flows from the contract of marriage and which was, although generally discharged previously, yet one from which the husbands have latterly tried to escape in spite of a contract of which they have taken full advantage themselves.

As in *Masthan Sahib's case*[2] the defe dants in this case appear to have entertained the view themselves that the dower was payable on demand as in spite of the plea that it was deferred, they pleaded payment of the whole sum and thus, as pointed out in *Masthan Sahib's case*[2] showed their consciousness that it ought to have been so paid.

At all events, it would be dangerous to go back upon or overrule decisions which are not manifestly erroneous. They have stood the test of time and must be deemed to have influenced a majority of Muhammadans—living in this Presidency at least—into a belief that if the character of dower is not specified, it would be taken to be prompt.

The question of interest was not seriously contested and there is no reason why the plaintiff should not get it at the rate allowed by the lower Court, when she has been deprived of the use of her dower for such a long time, although it has been found to have been payable to her on demand.

1. (1873) 19 W.R. 315 (P.C.).
2. (1900) 10 M.L.J. 123: I.L.R. 23 Mad. 371 (F.B).

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Abdur Rahman, J.

For the reasons given, I would dismiss the appeal with costs throughout.

S. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

B. Kappini Gounder and others .. *Appellants** (*Defendants 1, 3 and 4*).

Kappini Gounder, *In re.*

Court-fees—Refund of court-fee—Withdrawal of appeal—Application for refund of court-fee—Sustainability—Inherent power of Court whether can be invoked—Court-Fees Act (VII of 1870), Ss. 13, 14 and 15.

Where an appeal is withdrawn as having been settled out of Court the appellant cannot apply for a refund of the court-fee paid by him on the memorandum of appeal. The Court's inherent power to order refund of court-fee can be invoked where the excess court-fee has been paid by mistake of party or in obedience to a wrong order of Court, but not where the court-fee has been properly paid.

In re *Chidambaram Chettiar*, (1934) 67 M.L.J. 321: I.L.R. 57 Mad. 1028, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Nilgiris, Ootacamund, in O. S. No. 53 of 1933.

V. T. Rangaswamy Aiyangar instructed by *T. R. Venkataraman* for Appellants.

K. S. Champakesa Aiyangar for *The Government Pleader* (*K. S. Krishnaswamy Aiyangar*) on behalf of the Government.

The order of the Court was pronounced by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—The appeal has been withdrawn as having been settled out of Court and the appellant makes a somewhat unusual request that he should be allowed a refund of the court-fee paid on the memorandum of appeal.

If we should have regard to what is taken to be the settled practice of this Court, this request should be summarily rejected; however, as a point of principle has been raised, we have gone into the matter carefully. *Ss. 13, 14* and *15* of the *Court-Fees Act* deal with refunds of court-fee and of these, *S. 13* provides for the return of the fee paid on a memorandum of appeal. The present case obviously does not come within the purview of that section. Then the question arises, has the Court power to direct a refund of court-fee, independent of the express provisions of the Court-Fees Act? The Courts

* Appeal No. 235 of 1935. 12th October, 1937.

have gone to the extent of holding that they can order a refund under their inherent powers, where an excess court-fee has been paid (*i*) by mistake of party, (*ii*) in obedience to a wrong order of Court. The principle underlying these decisions, if we may say so with respect, is both good law and sound sense. But to go further and hold that a court-fee, properly paid, can be refunded, would be to render nugatory, the express provisions of the Court-Fees Act, for, what difference does it make in principle, between permitting a document to be filed originally without a court-fee and refunding the court-fee already paid in respect of it? It is elementary that no Court has inherent power to do that which is expressly prohibited by statute.

Then turning to authority, In re *Chidambaram Chettiar*[1] is directly in point and supports our view. There are two cases on which the applicant relies, namely, *Mohammad Sadiq Ali Khan Nawab Mirza* v. *Saiyid Ali Abbas*[2] and *Galstaun* v. *Janaki Nath*[3]. These cases have, in our opinion, been rightly dissented from in the Madras case already referred to. Dissent has been expressed from those cases in other decisions also. (See *Indu Bushan Rai Chowdhry* v. *Secretary of State for India*[4] and In re *V. K. P. Chockalingam Ambalam* v. *Maung Tin*[5].)

In the result, the application is rejected with costs. The applicant will pay the fees payable to the Government Pleader which we fix at Rs. 30.

B. V. V. —— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Sivarama Aiyar .. *Petitioner* (Respondent-Plaintiff)*

v.

Ahilambal Ammal .. *Respondent (Petitioner-14th Respondent).*

Civil Procedure Code (V of 1908), O. 33, r. 9 (c)*—Petitioner to be declared pauper agreeing to sell a share of properties—Subject-matter of suit—Ground for dispaupering.*

1. (1934) 67 M.L.J. 321 : I.L.R. 57 Mad. 1028.
2. (1932) I.L.R. 7 Luck. 588.
3. (1933) 38 C.W.N. 185.
4. A.I.R. 1935 Cal. 707.
5. (1936) I.L.R. 14 Rang. 173 (F.B.).

* C. R. P. No. 986 of 1936. 1st September, 1937.

Sivarama Aiyar *v.* Abilambal Ammal.

Where the plaintiff petitioned to be declared a pauper in a suit but the lower Court found as a matter of fact that there was an agreement to transfer the subject-matter of the suit in favour of one *M*, but it was contended in revision that even if the agreement was accepted as genuine, it did not create any right in the subject-matter of the suit,

Held, that since by the agreement the petitioner had agreed to repay advances of money made as well as promised to be made subsequently and also had undertaken to sell one-fourth share of the properties to which he might be held entitled in case he failed to repay the money within due time, an agreement of such a nature fell within the language of O. 33, r. 9 (*c*) which is wide enough to cover an interest as was created by the petitioner in *M's* favour.

The provisions contained in O. 33, Civil Procedure Code were designed to aid *bona fide* litigants and must be strictly confined to them.

Charu Sila Dasi v. *Haran Chandra Mukherjee*, (1919) 50 I.C. 520, relied on.

Petition under Ss. 115 of Act V of 1908 and 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Trichinopoly, dated 15th August, 1936, and made in I. A. No. 849 of 1936 in O. S. No. 47 of 1935.

T. S. Venkatesa Aiyar for Petitioner.

T. R. Srinivasan for Respondent.

The Court delivered the following

JUDGMENT.—This is a Civil Revision Petition against an order of the Principal Subordinate Judge of Trichinopoly dispaupering the plaintiff under O. 33, r. 9 of the Code of Civil Procedure on the ground of his having entered into an agreement with one Manickam Pillay with reference to the subject-matter of the suit. The execution of the agreement was admitted, but it was alleged that the agreement was neither in respect of the subject-matter of the suit, nor had any person obtained an interest in such subject-matter. After the agreement was produced by Manickam Pillai, the plaintiff alleged subsequently that the agreement was altered in material particulars after its execution and that he did not know of such alteration until it was produced in Court.

After recording evidence in the proceedings, the learned Subordinate Judge found it as a fact that the agreement was not altered. The petitioner now asks me to interfere with this finding on the ground that it is erroneous. After hearing his counsel's arguments who led me through the evidence, I find myself in agreement with the finding of the Court below. Even if I had not arrived at the same conclusion, I would not

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have been entitled to interfere with it. The lower Court was entitled to come to a finding and having determined the question of fact against the petitioner, it cannot be said to have acted either illegally or with any material irregularity. It is thus clear that this ground is neither correct nor open to the petitioner in revision.

It was then contended on behalf of the petitioner that even if the agreement was accepted as genuine, it did not create any right in the subject-matter of the suit. A reference was made by his counsel to S. 54 of the Transfer of Property Act and S. 17 of the Registration Act, which was in my opinion wholly irrelevant in this case. Under the terms of the present agreement Manickam Pillai had advanced a sum of Rs. 500 to the petitioner towards the expenses already incurred by him in conducting the suit till then and had also agreed to advance another sum of Rs. 500:

"For taking steps and for the expenses that may be necessary hereafter till the disposal of the suit in the Sub-Court, Trichinopoly."

The petitioner had in consideration of the advances so made and promised to be made subsequently, agreed to repay the amount of Rs. 1,000 with interest within three months of the disposal of the suit. He had further undertaken to sell one-fourth share of the properties to which he might be held entitled, if he failed to repay the money due from him within the time mentioned above.

An agreement of this nature does fall in my opinion within the language of O. 33, r. 9 (*c*) which is wide enough to cover such an interest as was created by the petitioner in Manickam Pillai's favour. Moreover as observed by Mullick, J., in *Charu Sila Dasi* v. *Haran Chandra Mukherjee*[1] the provisions contained in O. 33, Civil Procedure Code, were designed in aid of *bona fide* litigants and must be strictly confined to them. With this observation of the learned Judge, I respectfully agree.

I would therefore reject the petition for revision with costs.

The petitioner's counsel asked me in the end that if his petition was not to be accepted, I might grant him further time to pay the necessary court-fees. The Court has power to do so under S. 149, Civil Procedure Code, and in view of

1. (1919) 50 I.C. 520.

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the fact that the lower Court had also granted him a month to pay the requisite court-fees of which he could not avail himself, on account of this petition having been filed and admitted, I would accede to this request and order the petitioner to pay the necessary court-fee within a fortnight from this date.

K. C. —— *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

PRESENT:—LORD THANKERTON, SIR SHADI LAL AND SIR GEORGE RANKIN.

The Firm of Radha Kishan Jaikishan and others .. *Appellants**

v.

The Municipal Committee, Khandwa .. *Respondents.*

P.C.

Firm of Radha Kishan Jaikishan v. Municipal Committee, Khandwa.

Local Government—Levy of tax by Municipality—Notice by Municipal Committee defining rate of tax—Validity of resolution—Approval by special meeting—Central Provinces Municipal Act (XVI of 1903), S. 39.

The appellants instituted two suits against the respondent committee disputing the validity of a tax purporting to be imposed under the Central Provinces Municipal Act, 1903, on the trade of ginning and pressing cotton by means of steam or mechanical process. Sub-S. (1) of S. 39 of the said Act provides as follows: "A committee may resolve at a special meeting to propose the imposition of any tax for purposes of this Act; and sub-S. (2) provides that "where a resolution has been passed under sub-S. (1) the committee shall publish . . . a notice defining . . . the amount of the tax to be imposed". The respondent committee published a notice defining the amount or rate of tax to be imposed on the trade of ginning and pressing cotton by means of steam or mechanical process. The Judicial Committee remanded the case for the respondent committee to let in evidence as to the contents of the resolution passed at the special meeting of the committee.

Held, on the evidence, that the respondent committee had failed to prove that the amount or rate of tax had been resolved upon at the special meeting and that the tax had therefore not been validly imposed.

Decision of the Judicial Commissioner of the Central Provinces reversed.

Consolidated appeals from two decrees of the Court of the Judicial Commissioner, Central Provinces, dated 20th November, 1928, the first affirming a decree of the Subordinate Judge of Khandwa dated 11th April 1924, the second reversing a decree of the Additional District Judge of Khandwa dated 6th February, 1926.

The judgment delivered by the Board when the appeals came up for hearing in the first instance is reported in *Radha Kishan*

* P. C. Appeals Nos. 3 and 4 of 1931. 2nd March, 1937.

Jaikishan (Firm) v. *The Municipal Committee, Khandwa*[1]. The facts of the case and the circumstances leading to the remand are fully set out in that judgment.

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Firm of Radha Kishan Jaikishan *v.* Municipal Committee, Khandwa.

Dunne, K.C. and *J. M. Parikh* for Appellants.

De Gruyther, K.C. and *Wallach* for Respondents.

2nd March, 1937. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—The further enquiry, for which these appeals were remanded to the Court of the Judicial Commissioner, Central Provinces, by the Order in Council dated the 21st December, 1933, was taken in the Court of the Additional District Judge, Khandwa, and has been transmitted to this Board by the Court of the Judicial Commissioner.

The situation was made clear in the judgment of this Board dated the 18th December, 1933, to which reference may be made. The only issue remaining to be determined may be restated.

S. 39 of the Central Provinces Municipal Act, 1903, so far as material, provides as follows:—

"39.—(1) A committee may resolve at a special meeting to propose the imposition of any tax for the purposes of this Act.

"(2) Where a resolution has been passed under sub-S. 1, the committee shall publish, in the prescribed manner, a notice defining the class of persons or description of property proposed to be taxed, the amount or rate of the tax to be imposed, and the system of assessment to be adopted."

The respondents claimed that a resolution was duly passed at a special meeting of the Municipal Committee held on the 16th July, 1922, which satisfied the requirements of sub-S. 1 of S. 39. The resolution was recorded in the Committee's proceeding book as follows:—

"(3) Read Secretariat letter No. 731-343-VIII, dated the 30th March, 1922, on the subject of imposing a tax on the trade of ginning and pressing cotton by means of steam or mechanical process.

"Read also the draft bye-laws prepared by the President, together with his note recommending to adopt them for imposing this tax in this municipality with a view to increase the committee's income.

"The bye-laws adopted by Murtizapur and other municipalities in Berar, where this tax has already been imposed, were also read.

"Resolved that the proposed bye-laws drafted by the President be passed and that they be published locally as well as in two successive issues of the Central Provinces Gazette for inviting objections or suggestions in respect of them within one month from the date of their publication.

1. (1933) 66 M.L.J. 551: L.R. 61 I.A. 125 (P.C.).

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"*Note.*—Seth Kamaruddin proposed that this tax be imposed on the trade of pressing cotton only and not on ginning. This proposal was, however, dropped, as it was not seconded by any member."

Commenting on this document, their Lordships observed :—

" This slovenly record is opened to the comment that, but for the note at the end, it might be doubtful if the question of the imposition of the tax was considered and resolved on by this meeting. The notice convening the meeting had stated the business as ' Consideration of the bye-laws regarding the imposition of a tax on the trade of ginning and pressing cotton '.

" But the criticism of more immediate importance is that the record contains no reference to the amount of the tax to be imposed, and it is clear, in their Lordships' opinion, that, in view of sub-Ss. 1 and 2 of S. 39 of the Act of 1903, it is essential that the resolution contemplated by sub-S. 1 should settle the amount or rate of the tax. If, however, the ' proposed by-laws drafted by the President ' can be identified, it should then be possible to ascertain definitely whether the amount or rate of the proposed tax was involved in the resolution. But it is here that difficulty and confusion arises; there is no documentary evidence which enables one to identify the ' bye-laws ' referred to in the resolution, and, as already stated, the parties adduced no oral evidence at the trial."

It was in these circumstances that their Lordships gave the respondent the opportunity of adducing evidence to identify the " bye-laws drafted by the President " referred to in the resolution of the 16th July, 1922, the appellants being entitled to adduce evidence in reply thereto.

The amount or rate of the tax proposed to be imposed, of which notice was published as provided by sub-S. 2 of S. 39, was as follows:—

	Rs.	A.	P.
"(1) For each bondri of three maunds ginned	0	1	6
(2) For each bale of $4\frac{1}{2}$ maunds, pressed ..	0	2	3"

It is for the respondent Committee to prove clearly that this amount or rate of tax was consciously resolved upon at the special meeting of the 16th July, 1922. In the opinion of their Lordships they have failed to do so.

Evidence for the respondent Committee was given by three members of the Committee at that time, the President, the Vice-President and a member of the Committee and also by the head clerk in the Municipal Office at that time. The appellants' two witnesses were members of the Committee who were present at the meeting of the 16th July, 1922, but their recollection is not very clear, and their Lordships will deal with the matter on the evidence for the respondent Committee.

The respondents' case is that " the draft bye-laws prepared by the President " are that portion of Ex. D-1 in the second

suit, which is printed on pages 66, 67 and the top of page 68 of the record in that suit, and which was fully quoted in the judgment of their Lordships. Their Lordships accept that the same document forms part of Ex. D-1 in the first suit, but, as printed on pages 68 and 69 of the record in that suit, the date "15th July, 1922" and the signature of Mr. K. R. Harne have not been reproduced. This document is referred to by the witnesses as pages 9 and 10 of Ex. D-1 which, as printed, includes the amount or rate of the proposed tax as subsequently published and quoted above. But it is clear from the evidence of the head clerk that there are a large number of corrections on this document, one of them being dated as late as the 17th August, 1922, and the evidence of the President shows that there were changes in the rates proposed.

The President's evidence as to the preparation of the draft bye-laws may be shortly stated, but it may be first observed that the nomenclature of "bye-laws" and "rules" appears to have been applied indiscriminately, and their Lordships are willing to take it that the "draft bye-laws" referred to in the resolution included the part of the document which is headed "Rules".

On receipt of the letter from the Local Self-Government Department dated the 30th March, 1922, suggesting the tax here in question, the President instructed the secretary, K. R. Harne, to prepare a draft of the rules to be framed under S. 35 of the Act. The secretary put up a draft of the proposed rules on the 21st May, 1922. On this draft the President made some alterations, and, as so revised, it forms Ex. D-16. The amount or rate of the proposed tax, as shown in it, is:—

"(1) For each bondri of three maunds ginned, 1 anna.
(2) For each bale of 4½ maunds pressed, Re. 0-1-6."

On the margin there is a note with a circle round it, initialled by Mr. Harne and dated the 10th June, "This should be one pie per maund as per President's note, dated 26th May, 1922". On this last date the President asked Mr. Harne to get certain information as to weights from the ginning and pressing factories, and expressed the view that the taxation should be started with one pie per maund of cotton pressed and ginned, and asked Mr. Harne to make the necessary

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changes in the draft. After some correspondence with other Municipal Committees, in which information was asked for as to the local weight of the maund and other matters, the President addressed a memorandum (Ex. D-26) to the secretary on the 15th July, 1922, the material part of which is as follows:—

"I have made certain amendments in the draft of the bye-laws prepared by you (*vide* flag A). Please get a duplicate typed copy ready of the draft before this evening.

"My reasons for these changes are obvious. The local maund is equal to 40 seers while that of the Berar towns equal to 14 seers. The boja of Berar is called a bondri at Khandwa. The rate of the tax in the municipalities of Yeotmal, Akot, Karanja, Mulkapur, Shegaon and Khamgaon is one pie for every 35 pounds ginned and one pie for every 39⅛ pounds pressed while the tax proposed to be levied in our municipality is one pie for every 20 pounds of cotton ginned and pressed within our municipality. This change is advisable in view of the fact that the tax in the aforesaid municipalities was imposed in the year 1912 and the interim has seen economic changes of importance to justify the proposed increase."

The secretary's memorandum in reply, of the same date (Ex. D-25) states:—

"I beg to put up herewith a duplicate typed copy of the amended draft rules as ordered . . . . The rates proposed by you do not require any change, I think."

It is important to notice that the rates appearing in Ex. D-16, as revised by the President in May, and quoted above, correspond to a rate of one pie for every 20 pounds of cotton ginned and pressed. On anna for three maunds, the maund consisting of 80 pounds, equals 12 pies for 240 pounds, and, similarly, 4½ maunds at one anna and six pies equals 360 pounds at 18 pies. On the other hand, sheet 10 of Ex. D-1 shows a 50 per cent. increase on these rates, and there is no evidence to show when or by whom this increase was made, and it was for the respondent Committee to prove that the rates, as so increased, were before the meeting on the 16th July, 1922. In view of the slovenly way in which the records have been kept, there can be no presumption in favour of the Committee.

The President states that sheets 9 and 10 of Ex. D-1 were placed before the meeting, and he says: "The amendments referred to in Ex. D-26 are those to be found in sheet No. 10 of Ex. D-1. The alterations bear my initials. They relate to figures giving rates". These amendments, it

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will be noticed, do not include the 50 per cent. increase. The President further states that all the papers prior to his endorsement of D-25, including Ex. D-26, were before the meeting, and he adds, "I have not dated the correction in sheet No. 10 of D-1, but the date of this correction is to be deduced from the first paragraph of Ex. D-26. The reasons for the change in rates in sheet No. 10 of Ex. D-1 are given in second paragraph of Ex. D-26." He also states that Ex. D-26 is presumably the note of recommendation referred to by the secretary in the resolution of 16th July, 1922. All this evidence, as it stands, is *prima facie* inconsistent with the increase of 50 per cent. having been before the meeting, and, as already stated, no explanation is given as to the origin of this increase. This increase does appear in Ex. D-28, which, along with D-27, is a fair copy of the bye-laws made for purposes of publication, but the head clerk, who prepared them, states that he did so in obedience to the order of the secretary dated the 16th July, 1922, received by him on the 17th July, in the morning. He adds, "But the said documents bear my initials dated 15th July, 1922. I mean to say that the said documents were ready with my initials and were put up before the secretary after 17th July, 1922." This somewhat ambiguous statement is not pursued further, and, as it stands, is without value.

Their Lordships' conclusion, accordingly, is that the respondent Committee have failed to prove that the amount or rate of tax here in question was resolved upon by the special meeting of the 16th July, 1922, and that the tax has not been validly imposed.

Their Lordships will therefore humbly advise His Majesty that the appeals should be allowed, that in appeal No. 3 of 1931 the decree of the Court of the Judicial Commissioner dated the 20th November, 1928, and the decrees of the lower Courts should be set aside, and that the appellants should be granted an injunction as craved, and that in appeal No. 4 of 1931 the decree of the Court of the Judicial Commissioner dated the 20th November, 1928, should be set aside, and the decree of the Additional District Judge, Khandwa, dated the 6th February, 1928, should be restored. The appellants will have the costs of these appeals, and in appeal No. 3 their costs

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in the Courts below and in appeal No. 4 their costs in the Court of the Judicial Commissioner.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondents: *Stanley Johnson & Co.*

R. C. C. —— *Appeals allowed.*

B. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE VENKATARAMANA RAO.

The M. & S. M. Ry. Co., Ltd., represented by its Agent, Madras .. *Appellant** (*1st* (*Defendant*)

v.

Garimella Satyanarayana & Sons and another .. *Respondents* (*Plaintiff and 2nd Defendant*).

M. & S. M. Ry. Co., Ltd. *v.* Satyanarayana & Sons.

Railway Company—Risk-note—Goods entrusted for carriage—Loss and non-delivery of consignment—Proof of loss by fire not forthcoming—Under risk-note company bound to disclose their good conduct and to account for the proper care of goods in the absence of clear proof of fire accident—Opportunity to adduce evidence not taken by Railway Company—Damages to be awarded to consignor.

Where a consignor entrusted goods to a Railway Company but the goods were not delivered as they were destroyed, but the company sought to escape from their obligation by relying on the risk-note B in pursuance of which the goods had been entrusted to them for carriage.

Held, that the Railway Company having failed to prove that the goods were lost by fire and being bound under the risk-note to disclose to the consignor how the consignment was dealt with throughout the time it was in their possession or control or to give evidence in respect thereof in the absence of clear proof of loss of goods by fire or accident to trains, and having failed also to take the opportunity to satisfy the demand of the consignor to fulfil their obligation of disclosure, they became liable in damages.

Surat Cotton Spinning and Weaving Mills v. *Secretary of State for India in Council*, A.I.R. 1937 P.C. 152 (P.C.), followed.

Appeals against the decrees of the Court of the Subordinate Judge of Narasapur dated 30th June, 1930, in O.S. Nos. 3 and 36 of 1929 and petitions under S. 25 of Act IX of 1887 praying the High Court to revise the decrees of the Court of the Subordinate Judge of Narasapur dated 5th September, 1930, in S. C. S. Nos. 339, 352, 550, 627, 768, 774 of 1928, 69, 74 and 90 of 1929, respectively.

* Apps. 347 and 348 of 1931 and C. R. Ps. Nos. 463 to 471 of 1931. — 5th August, 1937.

M. & S. M. Ry. Co., Ltd. *v.* Satyanarayana & Sons.

P. Somasundaram for Appellant in both (Appeals and Revision Petitions).

G. Lakmanna and *G. Lakshmanna* for Respondents in Appeals and in C. R. P. Nos. 463 and 466 of 1931.

K. Kameswara Rao and *Y. Suryanarayana* for Respondents in C. R. Ps. Nos. 465 and 468 of 1931.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—These two appeals arise out of two suits brought for the recovery of damages for non-delivery of the goods entrusted to the first defendant the M. & S. M. Railway Company through the second defendant their out-agency contractor. Both the receipt of the goods and non-delivery are admitted. The Railway Company sought to escape from their obligation by relying upon the Risk-note Form B in pursuance of which the goods were entrusted to them for carriage. They pleaded that the goods were lost by fire while they were kept in a shed near the Nidadavole railway station and therefore they were not guilty of any misconduct and that unless misconduct is proved against them they cannot be rendered liable. The lower Subordinate Judge found that the Railway Company failed to prove that the goods were lost by fire. He came to the said conclusion on a consideration of both the oral and documentary evidence in the case. Mr. Somasundaram sought to canvass that finding before us. We have gone through the said evidence and we see no reason to disturb the said finding. Only three witnesses were examined in support of the alleged loss by fire. They are D. W. 2, D. W. 3 and D. W. 5. The specific case sought to be proved through the said oral testimony is that the goods were sent from Palacole where they were entrusted to the second defendant's agent on or about the 23rd January, 1928, to Nidadavole for entrainment and for three days they were taken to the railway station but on account of the non-availability of wagons they could not be booked and they were brought back to the shed and kept there till the night of the 6th February, 1928, on which night there was a fire and the goods were lost. D. W. 5 does not know anything personally about the storage of the goods. D. W. 2 is the booking clerk of the second defendant. He is unable to state on what dates the goods were taken to the railway station and brought back. All that he says in his evidence is that the goods were put in

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Venkataramana Rao, J.

the shed but he does not say when. He does not further say that the goods were continued to be kept there until the 6th February and were in the shed when the fire occurred. D. W. 3 is a night watchman who is said to have watched the shed on the night when the fire occurred but he does not know specifically about the existence of these goods in the shed that night. He says that there is a second watchman whose business was to check the bundles but that second watchman has not been called and there is no evidence that these goods were checked on the 6th and were found to be existing there before the fire occurred. There is no documentary evidence produced in support of the fact that these goods were there that night. It is alleged that the registers which might have thrown light on this fact were destroyed, but the evidence shows that the registers were being kept in a box and there is nothing to show that the box itself was destroyed. No doubt Mr. Somasundaram relied upon a telegram alleged to have been sent immediately after the occurrence and a report made by the second defendant to the first defendant to the effect that 35 cloth bundles were destroyed by fire. It is interested testimony on which no Court could act. The learned Subordinate Judge taking all these circumstances into consideration came to the conclusion that the Railway Company failed to discharge the obligation which rested on them to prove that the goods were destroyed by fire. Mr. Somasundaram contended that the second witness having stated that the goods were taken back from the Railway Station to the shed, there is a presumption that the goods must have continued to remain in the shed. We do not think that there is any such presumption in law. There is evidence in the case that the shed was not kept locked or maintained in such a manner as to lead to the inference that the goods could not be lost except by fire. The way in which the shed was maintained may also lead to the conclusion that the goods might have been stolen. So, under such circumstances we cannot say that the inference drawn by the lower Court is wrong.

The question now is, the Railway Company having failed to prove that the goods were lost by fire could they escape their obligation to compensate the plaintiffs for loss for non-delivery. Mr. Somasundaram contends that all they have to do is to allege some loss and adduce some evidence and it is

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incumbent upon the plaintiffs to allege and prove misconduct and for this he relies on the Risk-note. Under the Risk-note no doubt the Railway Company is freed from all responsibility for any loss of the consignment arising from any cause whatever except upon proof that such loss arose from the misconduct of the Railway administration's servants. But there is a proviso which has been introduced recently and which considerably modifies the obligations of the Railway Company. Under the proviso in the case of non-delivery of the whole consignment where such non-delivery is not due to accidents to trains or to fire, the Railway administration is bound to disclose to the consignor how the consignment was dealt with throughout the time it was in their possession or control and to give evidence in respect thereof and if misconduct on the part of the Railway administration cannot be inferred from such evidence then only the burden of proof is shifted to the consignor. A similar Risk-note Form B was the subject of interpretation before their Lordships of the Judicial Committee in a recent case (*Surat Cotton Spinning and Weaving Mills* v. *Secretary of State for India in Council*[1]). Their Lordships clearly lay down there that there is a distinct obligation on the part of the Railway Company to give full disclosure of how the goods have been dealt with by giving necessary evidence and explain what that necessary evidence should be. The evidence according to their Lordships must be all the evidence which the Railway administration considers desirable to avoid a fair inference of misconduct keeping in mind the provisions of S. 114 of the Evidence Act.

In view of this recent pronouncement it is clear that a Railway Company will be liable if they fail to account as to how the consignment was dealt with or from the evidence adduced in regard thereto an inference of misconduct can be presumed or if misconduct is proved. The loss by fire in this case has been relied upon by the Railway Company for two reasons: (1) to escape the obligation imposed upon them by the proviso, and (2) to show how the consignment was dealt with. Now the finding is that the Railway Company has failed to satisfactorily establish that the goods were lost by fire. From this it follows that they have failed to account as to how they

1. A.I.R. 1937 P.C. 152 (P.C.).

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dealt with the goods during the time they were in their possession and control and as observed by their Lordships in the said case if the admission fails to take the opportunity to satisfy the demands of the consignor to fulfil their obligation of disclosure so far as endorsed by the Court they will be in breach of their contractual obligation of disclosure. Therefore having failed to account for the loss of the goods and for the non-delivery thereof the Railway Company is liable. The decision of the lower Court awarding damages is therefore correct. Mr. Somasundaram objects to the award of interest from the date when the loss is alleged to have occurred. We think that the lower Court is not right in giving interest on damages from the date of the alleged loss. We therefore modify the decree of the lower Court by awarding interest at six per cent. on the amount of damages awarded from the date of the plaint. In other respects the decrees of the lower Court are confirmed and the appeals are dismissed with costs.

With regard to the memorandum of cross-objections in Appeal No. 347 of 1931 we think Mr. Lakshmanna is right in his contention in regard to the costs allowed to the second defendant and we allow the appeal in regard thereto as we think that the award of costs is not justified.

C. R. Ps. Nos. 463 to 471 of 1931.

Following our judgment in Appeals Nos. 347 and 348 of 1931, we dismiss these Revision Petitions with costs and fix the Advocate's fee at Rs. 10 in each except in C. R. Ps. Nos. 465 and 468 where we fix it at Rs. 20 in each.

K. C. *Appeals and Revision Petitions dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Y. Kothandarama Reddy and others.. *Petitioners** (*Accused*)

v.

Kandra Balarami Reddy .. *Respondent* (*Complainant*).

Kothandarama Reddy v. Balarami Reddy.

Indian Penal Code (XLV of 1860), S. 206—Accused harvesting standing crop which had been attached—Amin of Court protesting against action—

* Crl. R. C. No. 862 of 1936.
(Crl. R. P. No. 781 of 1936). 17th March, 1937.

Kothandarama Reddy *v.* Balarami Reddy.

Complaint of surety in whose custody property was—Whether 'fraud or intent to defraud' existing.

The first accused was the guardian of two minor judgment-debtors against whom a decree-holder obtained an order for attachment of standing crop. The complaint of the surety in whose custody the attached crops were, was that the first accused and two lessees of the property had begun to harvest before the amin came and refused to desist from their action when the Court officer protested against it. On the ground of a technical objection by the accused that the offence with which he was charged being one under S. 206, Indian Penal Code, instead of under S. 379 as framed and the sanction of the District Judge not having been obtained according to his contention, the proceedings were incompetent,

Held, that all that had happened was that in order to forestall the action of the Court the accused were said to have gone openly to the field and harvested the crops. Their action would undoubtedly have been dishonest if evidence of the prosecution had to be believed. But it was not fraudulent within the meaning of Sir James Stephen's interpretation of the words 'fraud or intent to defraud' and as applied by the judgment of Burn, J., in *Ramaswamy Ambalam* v. *Nagasubramania Aiyar*, (1936) M.W.N. 1150, which held that 'fraudulently' meant more than the word 'dishonestly' in S. 206.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Second Class Magistrate of Muthukur dated 2nd November, 1936, on the petition dated 1st September, 1936, in C. C. No. 31 of 1936.

K. Umamaheswaram for Petitioners.

C. A. Vaidhilingam for *P. V. Rajanannār* and *K. Subba Rao* for Respondent.

Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—This case arises out of an incident which is alleged to have occurred on the 8th January, 1936. The first accused is the guardian of two minor judgment-debtors against whom a decree-holder had obtained an order for attachment of a standing crop. On the 8th January, an amin was being sent from the District Court to harvest the crops which had been attached. The accusation in the complaint, which was filed by a surety in whose custody the attached crop had been left, was to the effect that the first accused, the guardian of the minors and the two lessees of the property had begun to harvest the crop before the amin came and refused to desist from their unlawful action when the amin arrived and protested. The complaint was laid under S. 379 of the Indian Penal Code. The prosecution evidence was over and a charge was

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framed under that section, and when all the prosecution witnesses except one had been further cross-examined after the charge, the accused raised the technical objection to the prosecution that the Court was incompetent to entertain the complaint on the ground that it disclosed an offence under S. 206 which required the sanction of the District Court. The learned Sub-Magistrate of Muthukur who tried the case thereupon wrote an order refusing to uphold this objection. The reason he gave was, that once the property had been attached and handed over to the custody of a surety, it could no longer be said that any action of the accused in harvesting the crop was done to prevent the crop being 'taken in execution'. There can be no doubt, I think, that the particular reason which the Sub-Magistrate gives for his decision is not a sound one. As has already been pointed out in a judgment of mine in *Sidhayyan* v. *Chinnamathayyan*[1], the phrase 'taken in execution' should be more widely interpreted, as meaning something equivalent to 'appropriated towards execution or utilised effectively in aid of execution'. I have however been also referred to a judgment of Mr. Justice Burn in Crl. R.C. No. 311 of 1936, *Ramaswamy Ambalam* v. *Nagasubramania Aiyar*[2]. In that case, the facts of which are almost precisely similar to the facts before me, Mr. Justice Burn had to consider what was the meaning of the adjective 'fraudulently' which is found in S. 206, Indian Penal Code. Mr. Justice Burn refused to accede to the proposition that 'fraudulently' means nothing more than 'dishonestly'. If I may say so with respect, he was amply justified in so holding. I may refer in this connection to S. 424, Indian Penal Code, which deals with an offence very similar to that defined in S. 206. S. 424 contains both the words 'dishonestly' or 'fraudulently'. It is clear that if the two words mean exactly the same thing, there was no need for only one of them to have been used in S. 206 and for both of them to have been used in S. 424. In the head-note to the case, reference is made to a definition of Sir James Stephen, who says:

> "Whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime, two elements at least are essential to the commission of the crime; namely, first, deceipt or an intention to deceive or in some cases mere secrecy."

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1. (1936) M.W.N. 212.
2. (1936) M.W.N. 1150.

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On the facts of the present case, there is no deceipt, there is no intention to deceive and there is no secrecy. All that has happened is that in order to forestall the action of the Court the accused are said to have gone openly to the field in question and harvested the crops. Their action is undoubtedly dishonest, if the prosecution evidence is to be believed, but it is not fraudulent within the meaning of that word as given by Sir James Stephen and as applied in the ruling in *Ramaswamy Ambalam* v. *Nagasubramania Aiyar*[1]. I am therefore of opinion that although the reason given by the Sub-Magistrate for refusing to entertain the objection of the petitioners in this case is not a correct one, the Magistrate's order, is after all correct for the other reason which I have applied. In the result, this revision petition is dismissed.

K. C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE VARADACHARIAR.

Penatapati Nageswara Rao .. *Petitioner* (Plaintiff)*

v.

Moka Narayanamurthi and another .. *Respondents (Defendants).*

Nageswara Rao v. Narayanamurthi.

Stamp Act (I of 1879), S. 35—Improperly stamped promissory note—Whether could be used as evidence for the collateral purpose of showing liability on previous notes and save limitation.

If an unstamped document cannot be admitted for any purpose, it must mean, if the words are to be given their ordinary and plain meaning, that it cannot be admitted under any circumstances in a Civil Court. If the legislature in placing the provision of law on the statute book had intended to allow unstamped instruments to be admitted for collateral purposes, it would surely have said so.

Where the question arose whether an improperly stamped pro-note could be admitted in evidence to prove acknowledgment of liability in order to save limitation in respect of promissory notes previously executed,

Held, that the improperly stamped document could not be used to prove a collateral purpose, namely, the acknowledgment of liability on previous notes.

Rakkappan Ambalam v. *Suppiah Ambalam,* A.I.R. 1930 Mad. 485 and *Vancheswara Sastri* v. *Narayana Aiyar,* A.I.R. 1933 Mad. 251, Pandalai's judgment dissented from.

Ramanatha Aiyar v. *Narayanaswami Aiyar,* (1937) 1 M.L.J. 163, followed.

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1. (1936) M.W.N. 1150.

*C. R. P. No. 945 of 1936. 30th August, 1937.

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S. A. No. 124 of 1930 judgment of Beasley, C. J. and King, J., followed. Statement of Mulla's Law of Insolvency, page 122, disapproved.

Fengl v. *Fengl*, (1914) P. 274 and *Mulji Lala* v. *Lingu Makaji*, (1896) I.L.R. 21 Bom. 201 (F.B.), relied on.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Amalapuram in Small Cause Suit No. 338 of 1935.

V. Viyyanna for Petitioner.

Respondents not represented.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The question raised by this petition is whether an improperly stamped promissory note can be admitted in evidence to prove acknowledgment of liability in order to save limitation in respect of promissory notes previously executed. The petition arises out of a suit filed in the Court of the Subordinate Judge of Amalapurm. The promissory note was in the following terms:

"On account of my necessity this day—that is, the amount due for principal and interest on the promissory note executed and delivered on 23rd June, 1929, is Rs. 93-3-0; the amount due on the promissory note executed and delivered on 6th July, 1929, is Rs. 92-13-0 and the amount due for principal and interest on the promissory note executed and delivered on 14th February, 1931, is Rs. 101. The total is Rs. 287. On demand I promise to pay you or order in one lump sum, the (said) principal together with interest thereon at Rs. 1-9-0 (One rupee and nine annas) per cent. per mensem, shall get the payment endorsed on this note and take it back. The consideration hereof has been received as aforesaid. This promissory note is executed with consent."

On a stamp of the value of one anna was appended the signature of the executant. The learned Judge before whom the case came refused to admit this document on the ground that its admission was prohibited by S. 35 of the Indian Stamp Act, 1899. The learned advocate for the petitioner contends that this decision is wrong. He says that the learned Judge should have admitted that portion of the document which recited the previous promissory notes, and that this would have saved limitation in respect of the earlier instruments. The relevant portion of S. 35 reads as follows:

"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped."

It will be observed that the instrument shall not be admitted in evidence for any purpose, nor shall it be acted upon, unless it bears the stamp prescribed by law. I should have thought

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that on the wording of this section it was clear that the promissory note in suit could not be admitted in evidence for the purpose sought by the petitioner or for any other purpose. But the petitioner's counsel has quoted two cases decided by Pandalai, J., which support his contention. He also relies on a passage from the work of the late Sir Dinshah Mulla on the Indian Stamp Act.

Before referring to these authorities I would point out that the words ' for any purpose ' did not appear in the General Stamp Act, 1869, but were inserted for the first time in the Indian Stamp Act, 1879, and that they were not introduced into the English Act until the year 1891 (54 and 55 Vict., Ch. 39). In 1849, the question of the admissibility of an improperly stamped document for collateral purposes was discussed by the House of Lords in the case of *Matheson* v. *Ross*[1]. It was there held that where a paper purported to be a receipt, and, as such, required a stamp, but also purported to be an agreed statement of accounts, which did not require a stamp, it might be given in evidence to show the agreed state of accounts only, though it had not been previously stamped. But it has since been accepted that the amendment in the English Act in 1891 has worked a change.

In *Rakkappan Ambalam* v *Suppiah Ambalam*[2], Pandalai, J., held that where a promissory note contained, in addition to the promise, a statement that the amount for which it was given was due in settlement of a previous account, the instrument, although inadmissible as a promissory note for want of sufficient stamp, was admissible to prove an acknowledgment under S. 19 of the Limitation Act. The reason given was that S. 35 of the Stamp Act merely shuts out the portion of the document which constitutes the promissory note and does not affect other statements in the document. The learned Judge expressed the same opinion in a later case, *Vancheswara Sastri* v. *Narayana Aiyar*[3], but it did not find acceptance by Beasley, C. J., in the recent case of *Ramanatha Aiyar* v. *Narayanaswami Aiyar*[4]. The learned Chief Justice there held that an insufficiently stamped promissory note could not be used for the purpose of proving an acknowledgment by the maker of it of his indebtedness. This was also a case in which

1. (1849) 2 H. L. C. 286 : 9 E.R. 1101.
2. A.I.R. 1930 Mad. 485.
3. A.I.R. 1933 Mad. 251.
4. (1937) 1 M.L.J. 163.

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it was sought to save limitation by the admission of the instrument in evidence. In the course of his judgment, Beasley, C. J., referred to the unreported case of *K. M. Subbayyar & Sons* v. *P. M. Lakshmana Aiyar*[1], where he and King, J., sitting as a Bench, dissented from the opinion of Pandalai, J. The learned Advocate for the petitioner has not referred us to any other decided cases which support the proposition which he has advanced, but has laid stress on a passage to be found at p. 122 of the third edition of Sir Dinshah Mulla's work. The conclusion arrived at by the author of that work is to the effect that an instrument not duly stamped may be admissible as proof for a collateral matter, but is not admissible as proof for a collateral purpose. By 'collateral matter' is meant any matter the proof of which does not depend upon proof of the transaction, and by 'collateral purpose' any matter the proof of which depends upon proof of the transaction. With great respect I consider that this statement conflicts with the wording of the section, which is very precise. Sir Dinshah Mulla would appear to go back to the case of *Matheson* v. *Ross*[2] which was decided before the words 'for any purpose' were introduced into the statute. That the English Law since the passing of the Act of 1891 is not the same as it was when *Matheson* v. *Ross*[2] was decided is to be gathered from the decision of President of the Probate, Divorce and Admiralty Division (Sir Samuel Evans) and Bargrave Deane, J., in *Fengl* v. *Fengl*[3] where it was held that the effect of the Stamp Act of 1891 is that an unstamped document, which requires a stamp, cannot be received in evidence, except in criminal proceedings, for any purpose whatever, including a collateral purpose. Sir Samuel Evans in his judgment remarked that whatever the law was before 1891 he was of opinion that the instrument with which the Court was then concerned was not admissible. As I have already pointed out the English Stamp Act of 1891 is the same as the present Indian Stamp Act in this respect.

The Bombay High Court in *Mulji Lala* v. *Lingu Makaji*[4] held that an acknowledgment of a debt coming under Art. 1, Sch. 1 of the Stamp Act I of 1879, could not, if unstamped, be given in evidence for any purpose including the

1. S. A. No. 124 of 1930.
2. (1849) 2 H. L. C. 286: 9 E.R. 1101.
3. (1914) P. 274.
4. (1896) I.L.R. 21 Bom. 201 (F.B.)

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purpose of saving limitation. There have been similar decisions by other High Courts, but it is not necessary to examine them in detail. The section itself, in my opinion, provides a complete answer to the petitioner's case. If an unstamped document cannot be admitted for any purpose it must mean, if the words are to be given their ordinary and plain meaning that it cannot be admitted under any circumstances in a civil suit. If the legislature in placing this provision of law on the statute book had intended to allow unstamped instruments to be admitted for collateral purposes, it would surely have said so. It did not say so, but on the other hand it provided that a negotiable instrument which is insufficiently stamped at the time of execution cannot be properly stamped afterwards, even on payment of a penalty which is allowed in the case of other documents.

For these reasons the petition must be dismissed.

K. C. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

The Canteen Contractors Syndicate, Limited, Madras .. *Appellants* in Municipal Taxation Appeal No. 4 of 1934 on the file of the Court of Small Cause, Madras*

v.

The Corporation of Madras .. *Respondent in do.*

Canteen Contractors Syndicate, Ltd., Madras v. Corporation of Madras.

Madras City Municipal Act (IV of 1919), S. 110, Sch. IV, part II, r. 7—Company having headquarters in Karachi—Doing business in Madras also—Depot in Madras—Whether liable to be taxed by the Municipality—If so in what manner.

Where a company supplying articles required for the army in India had its headquarters in Karachi and maintained a branch warehouse in Madras also, and from the evidence it was clear that though practically the whole of the business was done with their members, there were occasions on which sales were made to the public and purchases were made locally in the bazar, etc., on the questions (1) whether the appellant company's depot at Madras was liable to be assessed to pay company's tax under r. 7, part II, Sch. IV of the City Municipal Act, and (2) whether if such tax were to be levied, the assessment should be under proviso to r. 7 of the Schedule.

* R. C. No. 1 of 1935. 16th September, 1937.

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Held, (1) that when the company was doing business in the City for profit within the meaning of S. 110 of the City Municipal Act the first question must be answered affirmatively and hence the tax was leviable on it.

(2) Since the warehouse could not be properly described a branch of the syndicate the assessment of tax must be under the proviso to r. 7.

Case stated under r. 17 of the Taxation Rules in Sch. IV of the Madras City Municipal Act of 1919 by the Chief Judge of the Court of Small Causes in Municipal Taxation Appeal No. 4 of 1934 (preferred against the decision of the Standing Committee of the Corporation of Madras dated 24th February, 1934).

S. V. B. Rao, instructed by *King* and *Partridge* for Appellants.

A. Suryanarayana for Respondent.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—This is a reference by the learned Chief Judge of the Small Cause Court, Madras, under r. 17 of the Taxation Rules in Sch. IV of the Madras City Municipal Act. The points submitted for decision are:—

(1) Whether the appellant company's depot at Madras is liable to be assessed to pay companies' tax under r. 7, part II, Sch. IV of the Madras City Municipal Act, and

(2) if such a tax can be levied, whether the assessment should be made under the proviso to the above mentioned rule?

The appellant company is entitled "The Canteen Contractors Syndicate, Limited". It is a limited liability company registered under the Indian Companies Act. The members of the company are Canteen Contractors approved by the Army Department and the objects with which the company was formed were, mainly, the purchase overseas of all kinds of supplies required for the troops in India and the distribution of those supplies to the contractors (who also have to be approved by the Army Department). The head office of the Canteen Contractors Syndicate, Limited, is at Karachi. In Madras the syndicate maintains a warehouse. In charge of the warehouse there is a manager on Rs. 200 a month and he keeps six clerks who keep records of the articles received and the articles distributed. It is clear from the evidence of the manager that the members get their supplies from the warehouse, on indents which they fill in in the prescribed form. The manager of the warehouse has no discretion with regard to the prices which are fixed by the general manager at Karachi from time to time. But the

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members when they take delivery of the goods from the warehouse pay for them by drawing cheques in favour of the Canteen Contractors Syndicate, Limited and handing them to the manager of the warehouse. This, it is quite clear, is a series of transactions of sale. All the goods in the warehouse in one sense belong to the Canteen Contractors Syndicate, Limited; but that is not of course the same thing as saying that the goods belong to the several members of the syndicate. The members purchase the goods from the syndicate and pay for them in the ordinary way. The advantages they get are of course derived from the purchase on a large scale by and through the head office in Karachi. The manager of the warehouse stated in his evidence that the money realised by him was banked by him to the credit of the head office. But he admitted in cross-examination that he had submitted income-tax reports to the head office in respect of the costs of the business done in Madras. He stated also that although practically the whole of the syndicate's business is done with its own members, there are occasions on which sales are made to the public and on which purchases are made locally in the bazar. These, according to the manager, are a very small proportion—he said 1/10th per cent. of the whole; but nevertheless such transactions are made from time to time when there is a surplus stock or when there is a temporary deficiency. On these facts we have no hesitation in holding that the Canteen Contractors Syndicate, Limited, is transacting business within the City for profit within the meaning of S. 110 of the Madras City Municipal Act. We answer the first question accordingly.

The second question is whether the company is to be assessed to tax under the proviso to r. 7 of the Taxation Rules in Sch. IV. As we have already observed, the head office of this syndicate is at Karachi. It is not suggested that there is a principal office of the syndicate in the City of Madras. The only suggestion that has been made is that there is a branch office of the syndicate in Madras. From the description of his duties given by the manager of the warehouse we are clearly of opinion that there is no branch of the Canteen Contractors Syndicate, Limited, in Madras. There is a warehouse and in the warehouse business is done for and on behalf of the syndicate but the warehouse is not a branch of the

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syndicate. The manager, as already mentioned, is under the strictest control from Karachi. He has no discretion with regard to the prices; and he has no power of disposal of the money received from the members for goods supplied to them. He is obliged to pay all such moneys immediately into the Imperial Bank to the credit of the head office. The warehouse in Madras clearly cannot be described as a branch of the syndicate. That being so the assessment of tax on the company must be made under the proviso to r. 7. The second question referred to us is answered accordingly.

Since the Canteen Contractors Syndicate, Limited, the assessees, have failed on the first point and the corporation has failed on the second point we think it right to direct that each of the parties shall bear its own costs.

K.C. —— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[In Insolvency.]

PRESENT:—MR. JUSTICE WADSWORTH.

S. T. Nambi Chetty .. *Insolvent.**

Nambi Chetty, *In re.*

Presidency Towns Insolvency Act (III of 1909), S. 49 (3)—One of the creditors promising to finance the Official Assignee in his attack of the insolvent's fraudulent alienation—Price promised 25 per cent. of the net realisations—Whether an offence against the insolvency law.

It is lawful for the trustee in bankruptcy to buy the financial guarantee of one of the creditors by promising him a proportion of the net realisations as the price of his services and to treat this expenditure as a legitimate part of the cost of getting in the assets of the estate.

Where one of the creditors was willing for a consideration to finance and indemnify the Official Assignee in an attack on an alleged fraudulent alienation and to be compensated for the risk without offending against the principles on which the insolvency law is based and the Official Assignee proposed that the indemnifying creditor would be given 25 per cent. of the net realisations to the estate from the litigation as price of his assistance, and applied to Court that that price should be treated as 'cost of administration' under S. 49 (3) of the Presidency Towns Insolvency Act, and that all the creditors (including the indemnifying creditor) should share rateably in the balance of the realisations,

Held, that it was in effect a scheme whereby the Official Assignee, just as he would buy the services of an advocate and debit the estate, might buy the services of a guarantor and debit the estate. There would be no offence against the principle of equality of distribution of assets.

55 M.L.J. 657, referred to.

Guy v. *Churchill,* (1889) 40 Ch. D. 481, applied and explained.

English law compared.

The Official Assignee in person.

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* Petition No. 453 of 1936. 6th September, 1937.

The Court made the following

ORDER.—This application by the Official Assignee relates to a difficult and important question which is constantly arising in insolvency work, namely, how is an individual creditor, who is willing for a consideration to finance and indemnify the Official Assignee in an attack on an alleged fraudulent alienation, to be compensated for the risk which he runs, without offending against the principles on which the insolvency law is based. A former proposal that the financing creditor should be rewarded by having his debt paid in full in priority to the other creditors out of any amount that might be recovered was disapproved by Venkatasubba Rao, J., in the case of *Purushothamdas & Bros.*, In re,[1] as being opposed to the policy of equal distribution of assets, though the then Chief Justice in the appeal from that decision (O. S. Nos. 100 of 1927 and 5 of 1928) observes that such an arrangement might be unobjectionable if the other creditors consented to it.

In the present report, the Official Assignee suggests another way of attaining the same end and asks for the Court's directions. He desires to attack a purchase by the insolvent in the name of his wife as fraudulent. The creditors as a body are not willing to act and no individual creditor is prepared to run the risk of indemnifying the Official Assignee unless he gets some substantial benefit (in addition to his rateable dividend) out of the proceeds in case of success. This seems to me perfectly reasonable—the creditor who risks having to pay all the costs of failure naturally looks for something more than those who have refused to bear their share of the risk, in case of success. All that he will get by way of preferential rights under the Insolvency Rules (O. 6, r. 9) is a first charge on the realisations for any actual disbursements with interest thereon. Obviously this is not a very powerful inducement to an altruistic action. The Official Assignee therefore proposes that the indemnifying creditor shall be promised 25 per cent. of the net realisations to the estate from this litigation as the purchase price for his assistance, that this price shall be treated as "costs of administration" under S. 49 (3) of the Presidency Towns Insolvency Act, and that all the creditors (including, of course, the indemnifying creditor) shall share rateably in the balance of the realisations.

1. (1927) 55 M.L.J. 657.

Nambi Chetty, *In re.*

I can see no legal nor practical objection to this proposal. It is in effect a scheme whereby the Official Assignee, just as he buys the services of an advocate and debits the estate, may buy the services of a guarantor and debit the estate. There is no offence against the principle of equality of distribution of assets; all that is proposed is to treat as a legitimate expense to the estate the cost of procuring for the Official Assignee an insurance against the consequences of failure. The scheme is, in fact, very similar to that approved in *Guy* v. *Churchill*[1] whereby when bankruptcy intervened in the middle of an action by the bankrupt and the trustee was unwilling to incur the risk of continuing it, one of the creditors was permitted to do so at his own expense and risk in return for ¾ of the net realisations from the action. It was held that this arrangement offended neither against the law of maintenance nor against the law of bankruptcy.

The only difference between that case and the present proposal is that we are now concerned with a new litigation, not with the continuance of a pending action. This difference does not affect the recognition of the principle, namely, that it is lawful for the trustee in bankruptcy to buy the financial guarantee of one of the creditors by promising him a proportion of the net realisations as the price of his services and to treat this expenditure as a legitimate part of the cost of getting in the assets of the estate. I therefore approve of the Official Assignee's recommendation.

K. C. —— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE HORWILL.

S. Badsha Sahib & Co. .. *Appellant* (36th Defendant)*

v.

Thaliyil Vettath Lakshmi Kutty Kovilamma and others .. *Respondents (Plaintiffs 1 to 4 and defendants 1 to 12, 42 and nil).*

Badsha Sahib & Co. *v.* Lakshmi Kutty Kovilamma,

Malabar Compensation for Tenants Improvements Act (I of 1900)—Tenant of building—Whether entitled to claim compensation for improvements.

1. (1889) 40 Ch. D. 481.

* Appeal No. 367 of 1933. 6th October, 1937.

Badsha Sahib & Co. *v.* Lakshmi Kutty Kovilamma.

The benefit of claiming compensation for improvements conferred on tenants under the Malabar Compensation for Tenants Improvements Act of 1900 does not extend to a tenant of a building pure and simple. It cannot be said that because a building must necessarily stand on land, therefore it comes within the scope of the Act.

Chathukutty v. *Kunhappa*, (1927) 53 M.L.J. 224: I.L.R. 50 Mad. 813, approved.

Pathuma Umma v. *Moideen*, A.I.R. 1928 Mad. 929; *Pardath Chori George* v. *Thithi Umma*, (1930) 60 M.L.J. 214 and *Avaru* v. *Asi Bai*, (1931) 61 M.L.J. 462: I.L.R. 55 Mad. 151, considered.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in O. S. No. 35 of 1932.

C. Unikanda Menon and *K. Kuttikrishna Menon* for Appellant.

P. Govinda Menon and *T. N. Ravivarman Tirumalpad* for Respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—There was a mortgage granted on the 1st July, 1923, by the first defendant and his deceased brother in favour of plaintiffs 1 to 3 and another, which comprised 27 items. The transaction, we understand, was one of simple mortgage in respect of 23 out of them and in regard to the remaining four items, what was created was a usufructuary mortgage, which was to subsist for nine years. On the same date, the aforesaid four items were taken back by the mortgagors on lease for a period of five years. This suit has been brought to recover the items comprised in the lease with arrears of rent. The appellant before us is the 36th defendant, claiming under an alleged lease from the mortgagors, who complains that the lower Court has wrongly disallowed his claim to improvements.

Turning first to the pleadings, it is noticeable that in the written statement filed by the appellant, no such claim was made. There it is stated that he lent large sums to the mortgagors, who further caused him to expend monies for improving or altering the property, that it was found upon a settlement with them that Rs. 3,000 was due to him and that provision was made for its repayment in the rental agreement executed by the first defendant in his favour on the 16th May, 1931. Then he goes on to describe how by means of some kind of adjustment spread over six years, the period of the lease, the full amount was to be paid back to him. It is im-

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possible to read into this written statement a claim to improvements.

Then at the trial, no serious attempt seems to have been made to adduce evidence on the question of improvements. Indeed, it has not even been proved that the thirty-sixth defendant was a lessee for six years or that he was in possession even previous to the date of the mortgage as suggested. Neither the original lease deed nor the rental agreement of 1931 was produced or filed. Apart from these matters there is an objection, which in our opinion is fatal to his claim. In the written statement it is alleged (there is no reason why he should not be held bound by his own admission) that the lease was in respect of a shop and not, as now suggested, a shop and a paramba.

On the footing then that what was leased to the thirty-sixth defendant was a shop pure and simple, the question arises whether he can claim the benefit conferred upon tenants by Act I of 1900 (the Malabar Compensation for Tenants Improvements Act). The word 'tenant' is defined as including a person, who as lessee, etc., "of land, is in possession thereof". Here is a clear indication that the legislature did not intend that buildings or houses or shops should come within the purview of the Act, and the argument is fanciful that because a building must necessarily stand upon land, therefore it comes within the scope of the Act. The expression in the Act must receive its natural meaning and we are not prepared to hold that the benefit conferred by it extends to tenants of buildings. In *Chathukutty* v. *Kunhappa*[1] there is a judgment of Jackson, J., where this view has been taken, and with that we respectfully agree. It was held that whereas the Act applies to agricultural holdings and kudiyiruppus (vacant sites available for buildings), it does not apply to houses or shops. In subsequent decisions, this case has been referred to but never dissented from. In *Pathuma Umma* v. *Mohideen*[2] the facts are these. What was 'entrusted' to the defendants was a hut, but the new house which they built, covered a considerably larger area than the site of the hut. Reilly, J., held that even if the defendants were tenants of the hut, they were not tenants of the area outside the site of the hut, and from this, it followed

1. (1927) 53 M.L.J. 224: I.L.R. 50 Mad. 813. 2. A.I.R. 1928 Mad. 929.

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that the new house did not constitute a tenant's improvement. But Srinivasa Iyengar, J., bases his decision expressly on the ground, following the case just cited, that the lease was of a building. The suggestion that Reilly, J., in this case casts a doubt on the correctness of *Chathukutty* v. *Kunhappa*[1] is not well-founded. Nor has it been called in question in either of the two later decisions *Paredath Chori George* v. *Thithi Umma*[2] or *Avaru* v. *Asi Ba*[3] to which our attention has been called, although in the former case there are observations to the effect that it was unnecessary to express any opinion on the question whether the Act applies to leases of buildings or shops. Now turning to the actual decisions in these two cases *Paredath Chori George* v. *Thithi Umma*[2] "what was let was a compound or paramba or kudiyiruppa" (see page 216) and it was held that the lessee was entitled to compensation in respect of the house which he constructed on the vacant site; in *Avaru* v. *Asi Bai*[3] " the appellant obtained the property, which was a vacant site, on lease for erecting a house for residential purposes" (page 152) and he was held entitled to the value of the house which he built. The present case differs from them and resembles *Chathukutty* v. *Kunhappa*[1] where as here the lease was of a building—which case, we may note, has been followed without discussion, by a Bench of this Court (Wallace and Thiruvenkatachariar, JJ.) in L. P. As. Nos. 17 to 22 of 1925: This lends support to our view of the section.

In the result, the appeal fails and is dismissed with costs.

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE VARADACHARIAR.

The Champion Automobiles, Ltd., Madras .. *Appellants** (*Plaintiffs*)

v.

The Travancore National Bank, Limited .. *Respondents* (*Defendants*).

Champion Automobiles, Ltd., Madras *v.* Travancore National Bank, Ltd

Banker and customer—Contract as to banking account—Rules of bank—Closing of account without notice to party—Cheque subsequently presented

1. (1927) 53 M.L.J. 224: I.L.R. 50 Mad. 813.
2. (1930) 60 M.L.J. 214.
3. (1931) 61 M.L.J. 462: I.L.R. 55 Mad. 151.

*C. C. C. A. No. 1 of 1936. 19th August, 1937.

Champion Automobiles, Ltd., Madras *v.* Travancore National Bank, Ltd.

but returned with endorsement 'account closed'—Suit for recovery of damages for dishonouring cheque—Maintainability.

The defendant bank allowed the plaintiffs to open an account with them subject to the conditions set out in their rules one of which provided as follows: "The bank reserves to itself the right to close any account without reference to the depositor if in the opinion of the bank it is not desirable to keep such account for any reason whatever". At a time when the account was standing in credit to the extent of Rs. 15-4-7 the plaintiffs drew a cheque in favour of a third person for Rs. 12 but the bank closed the account on that day and when the cheque was presented for payment two days later the bank returned the same with the endorsement "account since closed". The plaintiffs instituted a suit for recovery of damages for the dishonouring of their cheque.

Held, that under the terms of the contract between the parties the bank had the right to close the plaintiffs' account without giving them any notice of the fact, and that the plaintiffs' suit for recovery of damages was not sustainable.

Appeal against the decree of the City Civil Court, Madras, dated the 22nd November, 1935 and passed in Original Suit No. 533 of 1934.

C. Chellam Aiyangar and *P. G. Raghavendra Rao* for Appellants.

Dr. V. K. John for Respondents.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The appellant was the plaintiff in a suit filed in the City Civil Court for the recovery of damages for the dishonouring of a cheque. The respondent is a bank carrying on business in Mount Road, Madras. In September, 1932, the appellant opened an account with the bank. The bank had rules regarding the keeping of accounts and one of the rules reads as follows:—

"The bank reserves to itself the right to close any account without reference to the depositor if in the opinion of the bank it is not desirable to keep such account for any reason whatsoever."

This was one of the conditions on which the plaintiff's account was opened and it formed part of the contract between him and the bank with reference to his account. There was a further rule to the effect that a depositor should always have a minimum credit balance of Rs. 100.

On the 1st August, 1934, when his account was standing in credit to the extent of Rs. 15-4-7, the appellant drew a cheque in favour of one C. R. Parthasarathi Mudaliar for Rs. 12, but the bank closed the account that day. The cheque was presented for payment on the 3rd August, when payment

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was refused on the ground that the account had been closed since the cheque had been drawn, the cheque being returned with an endorsement on a separate slip bearing the words "account since closed". When closing the account on the 1st August, the bank wrote to the plaintiff informing of the fact and sent him pay warrants for Rs. 15-4-7 and Rs. 3-11-1, the latter sum representing interest which the bank admitted had accrued due to the plaintiff in respect of his account. This letter was received by the plaintiff on the 3rd August, and on that date he wrote to the bank stating that he had drawn a cheque for Rs. 12 on the 1st August. He accordingly returned the warrant for Rs. 15-4-7 to meet this cheque. He kept the warrant for Rs. 3-11-1 against a larger claim for interest. He alleged that the bank was indebted to him for interest in the sum of Rs. 10 and had in fact already filed a suit to recover this amount. The relations between the parties therefore were not on an amicable basis when the account was closed by the bank, but this does not affect the question at issue.

The learned Judge found that there was no cause of action and in disposing of the claim observed:—

"It is argued that such a rule (that is, the rule giving the bank the right to close an account without reference to the depositor) is invalid because it is opposed to the ordinary code of banking business. But so long as it is not in violation of a statutory obligation I do not see why parties should not contract themselves in the manner they have chosen to do. The rule is in the nature of a contract entered into between the parties. It cannot be said that there is a statutory prohibition. Neither can it be said that it is immoral or that it is opposed to public policy. Under the circumstances I am of opinion that plaintiffs were not entitled to be given notice before the account was closed."

We are in entire agreement with these remarks. The rule is worded without any ambiguity. It gives the bank the right to close the account at any time without giving the plaintiff notice of the fact. I might add that in returning the cheque the bank was careful to point out that the account had been closed after the drawing of the cheque. Therefore there was no reflection on the plaintiff not that this would make any difference to the plaintiff's position, but it does provide another ground for holding that the plaintiff has brought this action without any justification.

The appeal will be dismissed with costs.

B. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction).

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

G. Thiruvenkatachariar, Official Liquidator of the National Live Stock Registration Bank, Limited (In liquidation) .. *Appellant** (*Applicant*)

v.

A. T. Velu Mudaliar and another .. *Respondents* (*Respondents*).

Thiruvenkatachariar *v.* Velu Mudaliar.

Indian Companies Act (VII of 1913), S. 235—Company—Liquidation—Brokers—Whether liable to repay amount received as commission to Official Liquidator—Broker whether an 'officer' of the company.

A broker has nothing to do with the management of the company and may have no knowledge of what is being done inside the company's office. Therefore, to classify him as an 'officer' of the company within the meaning of S. 235 of the Indian Companies Act would be putting too great a strain on the wording of the section.

Where a company was registered on the 2nd of July, 1927, but having become unsuccessful in its operations went into voluntary liquidation in 1930 which was converted into compulsory liquidation by an order of the High Court on the original side in 1932, and the official liquidator sought to make the respondents liable to repay a certain amount received by them in the shape of commission as share-brokers of the company,

Held, that if moneys had been wrongly paid to the brokers the official liquidator had, subject to the law of limitation, other means of recovering them; but he is not entitled to use S. 235 for the purpose. Hence in this case he could not proceed against the brokers as promoters of the company.

In re *The Liberator Permanent Benefit Building Society*, (1894) 71 L.T. 406, relied on.

On appeal from the judgment and order of the Hon'ble Mr. Justice Gentle dated the 28th day of April, 1937, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 845 of 1933 in O. P. No. 206 of 1932.

In the matter of The Indian Companies Act (VII of 1913) and *In the matter of* The National Live Stock Registration Bank, Limited (In liquidation).

C. Narasimhachariar for Appellant.

T. D. Srinivasachariar for Respondents.

The Court delivered the following

Leach, C. J.

JUDGMENTS. *The Chief Justice.*—This appeal arises out of a misfeasance summons taken out by the official liquidator of

* O.S.A. No. 47 of 1937. 28th September, 1937.

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the National Live Stock Registration Bank, Ltd., against the respondents, who were the brokers of the company. The company was registered on the 2nd July, 1927, with a nominal capital of Rs. 5,00,000 divided into 50,000 shares of Rs. 10 each, of which 40,500 were preferred and 9,500 ordinary shares. The certificate permitting the company to carry on the business was issued by the Registrar of Joint Stock Companies on the 1st August, 1927. The company was unsuccessful in its operations and went into voluntary liquidation on the 11th December, 1930. The voluntary liquidation was turned into a compulsory liquidation by an order of this Court, dated 13th October, 1932. The official liquidator sought to make the respondents liable to repay a sum of Rs. 8,865-11-3, which they had received as share-brokers of the company. The respondents are partners of a firm of provision dealers carrying on business under the name of A. T. Velu Mudaliar and Company. They had no previous experience as share-brokers and it is obvious that they owed their appointment to their relationship to V. K. Lakshmana Mudaliar, one of the promoters of the company, who is the son of the second respondent and the brother-in-law of the first respondent. A draft of the agreement under which the respondents were to act as brokers of the company was drawn up in the month of May, 1927, and, although the company had not then been registered, it was signed on the 31st May, 1927. Under it the respondents were to receive a very high commission, Rs. 1-8-0, for every share of the company sold through them, and eight annas in respect of every share sold through other agencies. Art. 9 of the Articles of Association which came into force at a later date stated that the respondents' firm should be the sole selling brokers of the company, and under it they were to receive a commission of five per cent. on the amount subscribed, but the document of the 31st May, 1927, purported to fix the commission at fifteen per cent. After the formation of the company the matter was discussed by the directors and on the 22nd October, 1927, they passed a resolution agreeing to ratify the arrangement, subject to an alteration which amounted to very little. The respondents accepted the modification and were paid on the basis of the modified agreement, notwithstanding that the directors had exceeded

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their powers in ratifying it. The appeal is not, however, concerned with the liability of the directors in this respect.

The amount paid to the respondents was, as I have already indicated, the sum of Rs. 8,865-11-3 which the official liquidator desired to recover from them on the ground that the agreement was *ultra vires*. Accordingly he took out a summons under S. 235 of the Indian Companies Act, 1913, and the matter in due course came before Stone, J., who referred the question of what was due under the agreement to the Official Referee. After holding an inquiry the Official Referee reported that the respondents were not entitled to retain the Rs. 8,865-11-3. The Official Referee's report came before Gentle, J., when it was contended on behalf of the respondents that all remedy against the respondents had become time barred. It was said that the article which applied to the case was Art. 36 of the Indian Limitation Act, which allows only a period of two years. The official liquidator urged that the article which applied was Art. 120, which allows a period of six years. The learned Judge found that Art. 36 applied and this appeal has been filed to challenge the finding. The Court is, however, not called upon to decide the question, as it is manifest that for other reasons the official liquidator is not entitled to ask for an order against the respondents under S. 235 of the Indian Companies Act, 1913. That section only applies to a person who has taken part in the formation or promotion of the company, to a past or present director, manager or liquidator or to an officer of the company. Neither respondent was ever a director, manager or liquidator of the company, and for reasons which I shall indicate I do not think that either can be deemed to be a promoter or officer. As a matter of fact so far as the second respondent is concerned, the Court is not asked to hold that he was a promoter.

I will first discuss the question whether the first respondent can be deemed to be a promoter. In *Twycross* v. *Grant*[1], Cockburn, C. J., defined the word 'promoter' as being one who undertakes to form a company with reference to a given project, and to set it going, and to take the necessary steps to accomplish that purpose. Other definitions have been given by learned Judges from time to time, but it is impossible to define

1. (1877) 2 C. P. D. 469.

accurately what is meant by the word "promoter". The difficulty is discussed at length by the learned author of Palmer's Company Precedents at pages 103 to 109. After referring to a number of the more prominent cases the learned author observes at page 106:

"It is obvious, therefore, that a person who originates the scheme for the formation of the company, has the memorandum and articles prepared, executed and registered, and finds the first directors, settles the terms (if any), and makes arrangements for advertising and circulating the prospectus and placing the capital, is emphatically a promoter in the fullest sense. He controls the formation and future of the company, and it is this *control* which lies at the root of the fiduciary relation of the promoter to the company. Nor is he the less a promoter if all or most of these activities are performed nominally by a company which he controls.

But a person who has done much less than this—takes a much less prominent part—may bring himself within the meaning of the term and may be held liable as a promoter."

Each case must be decided according to the evidence. If it is clear that the persons charged were merely servants or agents of the promoters or servants or agents of the company they cannot be classified as promoters, and in this connection the learned author makes mention of brokers, bankers and solicitors. Of course, brokers, bankers and solicitors could put themselves in the position of being promoters, but in order to do so they would have to travel outside their ordinary spheres.

Now, what are the facts here? As I have indicated the question of promotion only applies to the first respondent, it is said that he must be deemed to have taken part in the formation of the company and to be a promoter because he signed the memorandum and articles of association and subscribed for 100 shares. There is no evidence showing that he took any part in discussing the formation of the company or in taking any steps to bring the company into being, apart from the fact that he signed the memorandum of association and paid for 100 shares. It is not even suggested that he had anything to do with the drawing up of the memorandum and articles of association. There is no suggestion that the first respondent had anything to do with the selection of the directors or the settlement of any contract, except the contract under which his firm was to act as brokers. After the company had been formed and had started business, the first respondent's firm induced certain people to subscribe for shares, but it is not alleged that they did anything before the company was launched. The

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minimum subscription was fixed at 500 shares and the signatories to the memorandum of association themselves subscribed for 1,200 shares. In the memorandum of association the only persons referred to as promoters are V. K. Lakshmana Mudaliar and J. W. Samuel. It comes to this. The Court is asked to hold the first respondent to be a promoter because his signature appears at the foot of the memorandum and he took 100 shares of the 1,200 initially subscribed. This is a contention which I am unable to accept. The law requires that there shall be seven signatories to the memorandum of association of a public company. A person who has taken no part on the formation or promotion of the company may be asked to sign the memorandum as a subscriber for one or more shares, and this usually happens. It was mentioned in the course of the argument that the money subscribed by the first respondent for his 100 shares was utilised in defraying part of the expenses of forming the company. That may be, but it was a matter which concerned the directors. The application of the money which the first respondent paid for his shares was a matter over which he had no control, and the fact that the money was utilised in paying the expenses of formation cannot make him a promoter. The agreement with the respondents was an agreement which conscientious directors ought never to have entered into and in doing so the directors deliberately exceeded their powers. But this, of course, has nothing to do with the question whether the first respondent is to be deemed to be a person who took part in the formation and promotion of the company. For the reasons indicated it must be held that the official liquidator was not entitled to take out a summons against the first respondent on the ground that he was a promoter.

Can the respondents be deemed to be officers of the company? S. 2 of the Act defines the word "officer" as including "any director, manager or secretary but, save in Ss. 235, 236 and 237, does not include an auditor". The definition is therefore not exhaustive. The inclusion of the auditor for the purposes of Ss. 235, 236 and 237 follows the course adopted in England and avoids the discussion which had taken place in the Courts there with regard to the position of the auditor. But it does not follow because the auditor is an officer for the purposes of S. 235 the company's share-broker is in the

same position. (In re *The Liberator Permanent Benefit Building Society*[1].) Where the question was whether a person who was appointed to act as solicitor to the society was an officer of the society, Cave, J., observed:—

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"It seems to me that merely because he was appointed solicitor to the society, without more, the solicitor does not become an officer of the society any more than it has been held that a banker does if he is appointed banker to the society, or a broker if he is appointed broker to the society, or the auditor if he is appointed auditor to the society. All these persons render services to the society, but they cannot be said to be in the employment of the society so as to make them officials."

I can see no difference in the position of a broker to a company, whose duties are confined to dealing with the shares of the company and the position of the banker who has to deal with the moneys of the company. A broker has nothing to do with the management of the company and may have no knowledge of what is being done inside the company's office. Therefore, to classify him as an officer of the company within the meaning of S. 235 of the Act would, in my opinion, putting too great a strain on the wording of the section. If moneys had been wrongly paid to the brokers the official liquidator had, subject to the law of limitation, other means of recovering them, but he is not entitled to use S. 235 for the purpose.

For these reasons the appeal fails and must be dismissed with costs, which will be paid out of the assets of the company. The official liquidator will be allowed his costs out of the assets.

Madhavan Nair, J.—I entirely agree and have nothing to add.

Madhavan Nair, J.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE VARADACHARIAR.

Mohamed Hasan Khaleeli ... *Appellant** (*Petitioner*)

v.

P. Varadarajulu Naidu, Liquidator of the Tamil Nadu, Ltd., in Voluntary Liquidation, and others ... *Respondents* (*Respondents*).

Mohamed Hasan Khaleeli *v.* Varadarajulu Naidu.

Costs—Companies Act (VII of 1913)—Petition by a creditor for winding up—Original side—Creditors appearing in support of the petition—Petitioning

1. (1894) 71 L.T. 406.

* O. S. Appeal No. 52 of 1937. 24th August, 1937.

Mohamed Hasan Khaleeli *v.* Varada-rajulu Naidu.

creditor withdrawing petition—Supporting creditors not willing to continue the petition—Dismissal of petition—If supporting creditors entitled to costs—Original Side Rules of the High Court, Madras, r. 27 and Form No. 9—Difference between Indian and English law.

Where in a petition by a creditor for winding up, a number of creditors enter appearance and they all support the petition, they are not, on the petition being withdrawn and consequently dismissed, entitled to an order for costs in their favour, especially when they refused to continue the petition on such withdrawal in spite of being called upon by the Court to adopt the petition. The law in India is different in this respect from the English law, for here r. 27 of the Original Side Rules and the notice in Form No. 9 refer to the appearance of only persons who desire to oppose the winding up order, whereas the English Form allows interested persons to appear to support or oppose. Even in England a creditor appearing in support of the petition is not, unless he shows reasonable ground for appearing, entitled to his costs as a matter of right and even then it is usual to give only one set of costs to the creditors.

On appeal from the order of the Hon'ble Mr. Justice Gentle dated 28th April, 1937, and made in exercise of the Ordinary Original Civil Jurisdiction of the High Court in O. P. No. 3/2 of 1936.

K. Krishnaswami Aiyangar and *Mahomed Asker Ali* for Appellant.

W. A. P. Lobo, S. S. Rajagopalan, T. K. Rajagopalan, Kasturi Ranga Aiyangar and *K. M. Balasubramanian* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal raises a question with regard to costs in a winding up petition. In November, 1936, a resolution was passed for the voluntary winding up of the "Tamil Nadu Limited", a company registered under the Indian Companies Act, 1913. The company had been formed for the purpose of publishing a daily newspaper in Tamil in Madras. On the 11th December, 1936, the appellant filed a petition on the Original Side of this Court asking that an order might be passed for the winding up of the company under the supervision of the Court. This action was taken as the result of a resolution passed at a meeting of creditors held on the 2nd December, 1936. On the 15th December, a further application was filed for the appointment of an interim official liquidator. These petitions came before Gentle, J., on the 27th April of this year. The learned advocate appearing for the appellant then informed the Court that his client did not propose to pursue the winding up petition and he had no interest in it. The learned Judge enquired whether any other creditor would

proceed with the petition. I should mention that six creditors had entered appearances and professed to support the petition. Two of them, respondents 2 and 7, asked for time to look into the matter. Time was accordingly granted until next day when the case was again placed in the list. The learned advocate for the second respondent intimated that his client would like to continue the petition in the place of the petitioner, but later realising that he was not in a position to prove facts which would justify a supervision order being passed he informed the Court that he was not in a position to proceed further. The seventh respondent was also not willing to go on with the petition. In his case there was only a small amount due by the company. The learned Judge then passed an order dismissing both the petitions; and in respect of the petition for a supervision order, he directed that the petitioner should pay the costs of all parties appearing before him. As there were seven respondents, the voluntary liquidator and six creditors, this meant that the petitioner was required to pay seven sets of costs which would amount, we are told, to a sum of over Rs. 2,000. The petitioner has appealed against this order and contends that the learned Judge was not entitled to pass any order for costs against him.

While the position of the creditors who appeared is on a different basis, it is quite clear that the voluntary liquidator would have been entitled to his costs, because he had successfully opposed the petition. But he had agreed before the case came into Court on the 27th April that he would not press for his costs and that there should be an order dismissing the petition without costs. In these circumstances he does not ask for the dismissal of the appeal. In fact, he is quite agreeable to the appeal being allowed. The third respondent in the appeal leaves the matter in the hands of the Court. Respondents 2, 4, 5, 6 and 7 in the appeal strongly oppose the appeal.

The question involves a reference to the provisions of the rules of the Court and consideration of the principles which apply. Dealing first with the rules, r. 27 of the Rules of the Original Side of this Court under the Companies Act, provides that every petition for the winding up of any company by the Court, or subject to the supervision of the Court shall after admission, be advertised fourteen clear days before the hearing, and the advertisement is required to be in the terms of Form

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No. 9 to be found at page 324 of the rules. The form reads as follows:—

"Notice is hereby given that a petition for the winding up of the above-named company by the (or subject to the supervision of the) High Court of Judicature at Madras was on the day of 19 , presented to the High Court of Judicature at Madras, by the said company (*or* A. B. of , a creditor *or* contributory of the said company, *or as the case may be*). And that the said petition is directed to be heard on the day of 19 ; and any creditor or contributory of the said company desirous to oppose the making of an order for the winding up of the said company under the above Act, should appear at the time of hearing by himself or his Counsel or Vakil for that purpose; and a copy of the petition will be furnished to any creditor or contributory of the said company requiring the same, by the undersigned, on payment of the regulated charge for the same.

Attorneys or Vakils for the Petitioners."

It will be observed that this form only refers to the appearance of persons who desire to oppose the winding up order. It differs materially from the form prescribed by the English rules which allow interested persons to appear to oppose or to support. R. 101 of this Court states that in cases not provided for by the rules or by rules of procedure laid down in the Act, the practice and procedure of the High Court of Justice in England in matters relating to companies shall be followed so far as they are applicable and not inconsistent with the rules and the Act. It is said that by reason of this rule the English rule can be applied here and that the Court is justified in regarding the notice to appear as an invitation to appear to oppose *or to support*. I am unable to accept this contention. It is quite clear from the form of the notice that this Court only intended notice to issue to persons who wished to oppose. The law allows the Court to permit another creditor to take the place of a petitioning creditor who does not wish to proceed with his petition, but this is another matter and does not really affect the point under discussion.

We have here a notice inviting creditors who wished to oppose the application for a winding up order to appear at the hearing. The creditor-respondents to this appeal appeared in answer to the notice issued, but they appeared to support, not to oppose the petition. It is said that in these circumstances the petition having failed, they are not entitled to costs in their favour. They supported a petition which the Court dismissed,

We consider that there is great force in this argument. Moreover, none of the creditors who did appear were willing to undertake the burden of the petition. The second respondent did express his willingness at one time to undertake this burden, but he found it too much for him and quickly abandoned the idea. It seems to us that in these circumstances it is not open to him to oppose this appeal, and the same remark applies to the other opposing creditors.

We have been referred to a number of cases decided in England on questions relating to costs in winding up petitions. It appears to be usual there to allow one set of costs to the successful party and where the petition is withdrawn one set even to the supporting creditor or creditors. But it must be remembered that in England supporting creditors are invited to come in. They are not invited to come in under the rules of this Court. The question of costs must be decided in the light of the facts of the particular case. As a general rule the successful party is entitled to costs in his favour and the unsuccessful party is liable to have an order for costs against him. The opposing respondents in this case are not the successful parties.

A case which has a general application is that of *Hull and County Bank*, In re[1], where it was decided that a creditor appearing in a winding up petition is not entitled to his costs as a matter of right. To entitle him to them he must show reasonable ground for appearing. In giving the judgment in this case, Jessel, M.R., observed:—

> "I refused these costs, and I will state my reasons for doing so. I by no means assent to the proposition that creditors appearing on a petition to wind up a company are entitled to their costs as of right. It is usual to give one set of costs when many appear, and when there is a reasonable ground for appearing; but I have said before, and I repeat it, that I will not lay down any such rule as that creditors are entitled to their costs as of right, because that would induce solicitors to instruct counsel simply for the purpose of obtaining costs, and for no other purpose whatever."

I do not wish to suggest that appearances have been entered in this case for the mere purpose of obtaining costs, but the appearances of the respondent creditors have not been justified. When they were called upon to adopt the petition they refused to do so. I will not pause to consider what their

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1. (1878) 10 Ch. D. 130.

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motives might have been, but it is clear that they have not made out a case for an order for costs in their favour. The only order for costs which might have been made in the circumstances was an order in favour of the voluntary liquidator, but he did not ask for it.

The appeal will be allowed but we make no order for costs in the appeal. The appellant did not disclose before the learned trial judge the reasons why he was not proceeding with the appeal and his attitude was one which was sufficient to raise suspicion as to his motives. The liquidator will have his costs of the appeal out of the assets of the company.

S. V. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

Madana Palo and others .. *Appellants** (*Plaintiffs*)

v.

The Hindu Religious Endowments Board, Madras .. *Respondents* (*Defendants*).

Madana Palo *v* H. R. E. Board, Madras.

Madras Hindu Religious Endowments Act (II of 1927), Ss. 9 (5) and 57—Scheme for management of a temple framed by the Board of Commissioners —No provision for hereditary trustee on the management—Scheme wrong.

Where the Board of Commissioners under S. 57 of the Madras Hindu Religious Endowments Act framed a scheme for the management of a temple and in spite of objections of the appellants on the ground of the temple being an excepted one under S. 9 (5) of the Act, the Board appointed a council of three trustees of which none of the appellants happened to be a member, and upon the appellants instituting a suit under S. 57 (3) of the Act in the District Court which decided against the hereditary right to be represented,

Held, that since the family represented by the appellants had been proved to have been connected with the management of the temple as hereditary trustees for four generations and in the absence of proof of mismanagement sufficient to displace them, the Court was not justified in taking away the appellants' right of management. The scheme was wrong without provision for one of the appellants at least as one of the trustees under the new scheme framed.

Appeal against the decree of the District Judge of Ganjam in O. S. No. 10 of 1929.

B. V. Ramanarasu for Appellants.

P. V. Rajamannar and *K. Subba Rao* for Respondents.

* Appeal No. 61 of 1932. 15th September, 1937.

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Leach, C.J.

The judgment of the Court was delivered by

The Chief Justice.—The appellants were the plaintiffs in the Court below. They claim that the first appellant is the hereditary trustee of the Sri Radhakanta Mahaprabho temple of Bhavanipur. By an order dated 16th October, 1928, the Board of Commissioners for Hindu Religious Endowments framed a scheme for the management of this temple under the provisions of S. 57 of the Madras Hindu Religious Endowments Act, 1927. In spite of contentions by the appellants to the contrary the Board refused to recognise the temple as being an excepted temple within the meaning of S. 9 (5) of the Act and rejected the claim set up by the appellants that their family possessed the hereditary right of appointing a member as trustee of the temple. On this basis the Board decided that there should be a council of three trustees and placed the management of the temple in the hands of this council. No member of the appellants' family was, however, appointed to this council of trustees. The appellants were not satisfied with the Board's decision and instituted the suit out of which this appeal arises, as they had the right to do under S. 57 (3) of the Act. The learned District Judge agreed with the findings of the Board of Commissioners and adopted the Board's scheme. He held that the hereditary right claimed had not been established; that the temple was not an excepted temple within the meaning of S. 9 (5) and, therefore, a scheme should be framed under S. 57; that the lands which the appellants claimed to be theirs were in fact temple lands; and that the appellants had been guilty of mismanagement of the temple while carrying out the duties of trustees. All these findings have been challenged before us.

It will be convenient to take the question relating to the lands first. It is quite clear in our opinion that these lands were not granted to the appellants' family, but have throughout been temple lands. There are two parcels of lands, one situate in the village of Bodogumala, and the other in the village of Bhavanipur, where the temple is situate. The Bodogumala lands were granted to the temple some time prior to the inam settlement of 1862. The register of inams shows that the original grantee of the lands was the deity of this temple and the title deed which was granted by the Inam Commissioner on the 3rd December, 1862, was granted to the great-grand-

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father of the appellants as the manager for the time being of this temple. Paragraph 2 of the grant reads as follows:

"This inam is confirmed to you and your successors tax free to be held without interference so long as the conditions of the grant are duly fulfilled."

It will be observed that the grant was to the manager and to his successors and not to the great-grandfather of the appellants and his heirs. The register shows that the grant was given to the temple to defray the costs of daily pujas therein. In column 8 which is intended to contain the requisite information in the case of grants made for service, appear the words, "for the daily offerings of the deity service performed". It is on the strength of these words that the appellants contend that the grant was to their ancestors personally, subject to their defraying the cost of daily pujas in the temple. But this construction cannot be accepted in view of the fact that the register specifically states that the name of the original grantee is the deity of the temple, and in face of the wording of the inam grant we have no doubt that the appellants and their forefathers have regarded the Bodogumala village lands as their own and have so dealt with it. The fact that they have done so does not alter the fact that it was a grant to the temple and not to them. The title to the Bhavanipur lands is based on a patta granted in 1880 to the paternal uncle of the first appellant. It is not necessary to discuss whether the fact that this grant was in the paternal uncle's name makes any difference because it is admitted by the learned advocate for the appellant that the Bhavanipur lands stand in the same position as the Bodogumala lands and if the Bodogumala lands are temple lands and not family lands the Bhavanipur lands must also be regarded as temple lands. For these reasons we agree with the finding of the learned trial Judge that the appellants' family does not possess any right of ownership.

With regard to the question whether the first appellant is the hereditary trustee of the temple we do not accept the finding of the learned trial Judge. It appears to us on the evidence read in the light of the authorities that the only conclusion open to the Court is the appellants' family does possess right of appointing the trustee of the temple, which means that it is an excepted temple. There is uncontradicted evidence that the management of this temple has been in the

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hands of the appellants' family for four generations. The trustee in 1862, that is, at the time of the inam settlement, was their great grandfather and the office has been held by their paternal grandfather and by their father in succession. It has not been suggested that any one outside the appellants' family has ever partaken in the management of the temple. That this justifies the conclusion that the first appellant is the hereditary trustee is to be gathered from the decisions in *Ganapati* v. *Sitharama*[1] and *Rama Das* v. *Hanumantha Row*[2]. The case of *Ganapati* v. *Sitharama*[1] dealt with a claim to the office of karnam which had been held by the same family for three generations. The case of *Rama Das* v. *Hanumantha Row*[2] related to temple lands, and a question was raised whether the trusteeship was hereditary in the family of the plaintiff. The members of the family had held the office of trustee continuously for over a hundred years and there was no evidence that it was ever held by any other family. White, C. J. and Phillips, J., considered that this was sufficient to prove the hereditary right which had been set up. In the case of *Baboo Gopal Lall Thakoor* v. *Teluck Chunder Rai*[3] their Lordships of the Privy Council held that the absence in the deed of words importing the hereditary character of the tenure was supplied by evidence of long and uninterrupted enjoyment and by the descent of the tenure from father to the son, and that from this hereditary character could be legally presumed. The same opinion was expressed by the Judicial Committee in *Rajah Suttosurrun Ghosal* v. *Moheshchunder Mitter*[4]. We have in the case before us proof that the office has been held by the head of the appellants' family for four successive generations and that it is at present held by the first appellant as the son of his father. Further there is no suggestion that the trusteeship has ever been held outside the appellants' family. For these reasons we consider that the learned trial Judge was wrong in refusing to regard this as an excepted temple.

It is said, however, that the trial Court had the right to deprive the first appellant of his trusteeship and vest the management of the temple in a board of trustees because the first appellant and his brothers had been guilty of breach of

1. (1887) I.L.R. 10 Mad. 292.
2. (1911) 21 M.L.J. 952: I.L.R. 36 Mad. 364.
3. (1865) 10 M.I.A. 183.
4. (1868) 12 M.I.A. 263.

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trust. The alleged breaches of trust are; (*i*) the failure to keep accounts and (*ii*) the mortgaging of the temple lands. It may be observed that there is no suggestion that the appellants or their forbears have improperly spent the income of these lands, and when the complaint was made against them that accounts had not been kept they took steps immediately to rectify this. In addition they have since discharged all the encumbrances on the temple properties. In these circumstances we are unable to concur in the opinion that there has been such mismanagement on the part of the appellants that the Court is justified in taking away the right of management which the family possesses.

This means that the scheme has been framed on a wrong basis. The learned Advocate for the appellant does not object to a scheme being framed for the management of the temple, provided that the first appellant is allowed to continue to be the trustee and the hereditary right is not interfered with. We have held that the first appellant is entitled to be the trustee and that the family does possess the hereditary right of appointment. The scheme should provide for this. In view of the fact that the learned District Judge has placed the management of the temple in a board of trustees it will be necessary for the scheme to be re-settled. The case will therefore be sent back to the District Judge for the re-settlement of the scheme in the light of this judgment.

We direct each party to bear his own costs throughout.

K. C. —— *Case remanded.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD MACMILLAN, LORD MAUGHAM, SIR LANCELOT SANDERSON, SIR SHADI LAL AND SIR GEORGE RANKIN.

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Secretary of State for India in Council v. Midnapore Zemindary Co., Ltd.

The Secretary of State for India in Council .. *Appellant**

v.

The Midnapore Zemindary Company, Limited, and others .. *Respondents.*

Land revenue—Permanently settled estate—Part of estate submerged by river—Abatement of revenue granted in respect of loss—Reappearance of

* P. C. Appeal No. 17 of 1936. 31st May, 1937.
Bengal Appeals Nos. 6-15, 21-23 & 26 of 1931 & Nos. 14 & 15 of 1933.

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site—Whether land "added" to estate—Limitation—Recusant proprietor—Rent demanded by Government from tenant—Whether "arrears of revenue" —Bengal Alluvion and Diluvion Act (IX of 1847), Ss. 5, 6—Limitation Act (IX of 1908), Sch. I, Art. 16.

The principle that land forming part of a permanently settled estate which reappears after having been submerged by a river is not land "added to any estate paying revenue directly to the Government" within the meaning of S. 6 of the Bengal Alluvion and Diluvion Act, 1847, applies also where, as a result of the submerging, an abatement of the revenue payable on the estate was made by the Government in respect of the submergence. The word "added" in that section does not include, in addition to lands the title to which has accrued in a true sense to the permanently settled estate, lands which have all along remained part of that estate but have been exempted from revenue because they were at some previous date covered by water.

Secretary of State for India v. *Srimati Fahamidannissa Begum*, (1889) L.R. 17 I.A. 40: I.L.R. 17 Cal. 590 (P.C.), applied.

The only possible qualification to the application of the above principle would arise if, on the reduction of the assessment in consequence of the submergence, the submerged land ceased to form part of the original estate. The making of a reduction in the assessment under S. 5 of the Act of 1847 does not, however, effect any alteration in the title to the submerged land. While S. 6 assumes an acquisition of title by means of accretion, S. 5 is dealing with a loss of cultivable value, and does not purport to transfer the title to the land which has become covered with water. When land has been washed away from a revenue-paying estate, the revenue authorities are not given any discretion as to their action, as the words of S. 5 are mandatory, the authorities being directed to make the deduction without loss of time. The effect of an abatement of revenue taken in respect of a portion of the estate washed away cannot accordingly be regarded as abandonment of that portion for the benefit of the public domain.

Sums claimed by Government as rents payable by a tenant for lands held by him being rents settled by a Settlement Officer under S. 104 of the Bengal Tenancy Act (VIII of 1885) are not arrears of revenue within the meaning of Art. 16 of Sch. I to the Limitation Act, 1908; and it is immaterial that, at the time when the demand for the rent is made, the Government is holding *khas* the land of a recusant proprietor.

Consolidated appeals from a decision of the High Court, Fort William, Bengal (Mukerji and Mitter, JJ.) affirming the judgment of the Subordinate Judge of Rajshahi. The facts are set out in full in the judgment of the Board.

A. M. Dunne, J. C. and *J. M. Pringle* for Appellant.—There is no jurisdiction in the Civil Courts to adjudicate on the fairness or propriety of rents settled for tenants by a revenue officer. It was lawful for the Government to realise the settled rents from the company here, and the company is not entitled to recover them. The present claims of the company could only be properly brought in appropriate suits brought by them against the zemindar, and those questions are not the concern of the Government.

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L. De Gruyther, K.C. and *S. Kyffin* for 1st Respondent.— The lands which had been submerged are merely re-formations *in situ* of part of the permanently settled estate, and accordingly no additional revenue could be assessed on them. Those lands are not lands "added to the estate" within the meaning of S. 6 of the Bengal Alluvion and Diluvion Act, 1847. The revenue authorities' action in purporting to re-assess those lands is accordingly invalid. The taking of an abatement of revenue under S. 5 of that Act does not constitute an abandonment of the title to the land in respect of whose submergence the abatement is granted. In any case, even if the lands were "added lands" within the meaning of S. 6, no action taken by the proprietors or the Government could affect the title or tenure of the company. Further, the company's title and tenure must in any event remain free from interference by the revenue authorities or the settlement officer because no abatement of rent was granted in respect of them.

H. R. Abdul Majid for other Respondents.—No enhancement of rent could legally be made in the case of tenures which had been allowed by law previously, patni and similar under-tenures being created in accordance with legislative enactments. No subsequent dealings with zemindari rights between the zemindar and the revenue authorities could defeat the right of patnidars and others deriving title from them under those enactments. No submergence of lands could be regarded as discontinuance of possession by the zemindar or, consequently, by any one else, and no abatement of revenue could therefore affect that possession. The reappearance *in situ* of permanently settled land is for the benefit of the zemindar with whom the permanent settlement was made, and no subsequent dealing with the zemindar in respect of the lands could affect the patnidar. An abatement of revenue is temporary. The settlement is permanent, and all its incidents consequently run with the land as it reappears.

31st May, 1937. Their Lordships' judgment was delivered by

Lord Maugham.

LORD MAUGHAM.—In this case 14 appeals to His Majesty have been consolidated, 10 being brought by the Secretary of State for India in Council and four by the Midnapore Zemindary Company, Limited. Six of the former group (Nos. 6, 7, 8, 10, 11 and 15 of 1931) will be first dealt with. They arise out of six suits which were brought in 1921 and 1922 by the Midnapore Zemindary Company, Limited (the plaintiff company now respondents) and were tried by the Subordinate Judge of Rajshahi in 1927. The suits were numbered 21, 450,

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451, 94, 95 and 454. In each the plaintiff company's case was that in the suit lands they had the right of a permanent tenure-holder at a fixed rate of rent and their claim was for a declaration of the invalidity of certain proceedings taken by the Revenue authorities in the course of which orders had been made purporting to enhance their rent.

The facts as to the plaintiff company's title are not in dispute and it is unnecessary to refer to them in detail. All the lands in question, which lie in different districts along the sides of the River Padma, had been part of a permanently settled estate, Tauzi No. 523 of the Murshedābad Collectorate at the time of the Permanent Settlement (1793). The plaintiff company's position in four of the suits was that of holders of patnis which had been created in 1836 and 1866. In suits 94 and 95 they had permanent tenure at a fixed rent, held not directly from the zemindars but from intermediate tenure-holders whose right dated back to 1814 and 1835 respectively. In suit 95 two out of their three subtenures were darpatni and a sepatni tenure: one—granted in 1860—was an ordinary subtenure at a fixed rate of rent. In suit 94 one subtenure only is involved: it is not of patni character and was granted in 1896.

The Revenue Survey in this part of Bengal took place in 1853-4 and showed the suit lands to be dry land of the revenue-paying estate (touzi-mahal). In 1867-8 there was another survey (called a Diara Survey as its purpose was to ascertain the effect of fluvial action upon the lands) and the suit lands (with other lands) were shown to be then under water, in consequence whereof a deduction was, in 1871, made from the revenue payable by the zemindars to government, the deduction being made pursuant to the provisions of S. 5 of the Bengal Alluvion and Diluvion Act (IX of 1847). The permanent tenure-holders received no abatement of rent and it would seem that they claimed none. In 1913 the locality was again surveyed and action taken to assess the land revenue. Proceedings under Chapter X of the Bengal Tenancy Act, 1885, were begun. Under S. 104 of the Act, the Revenue Officer having prepared a record of rights, took steps to settle fair and equitable rents for tenants of every class including the patnidars and to prepare a settlement rent roll. The lands in suit having reappeared above water were treated as land

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"added to [an] estate paying revenue directly to Government" within S. 6 of Act IX of 1847. The Settlement Officer after some hesitation by order dated 18th March, 1919, proceeded to fix for these lands rents according to their value, disregarding the contractual rent fixed in perpetuity by the tenure-holders' leases. A much higher rent having thus been imposed upon the tenure-holders a corresponding assessment to revenue was made upon the zemindars. The zemindars, after some vacillation, refused to accept settlement on the terms offered with the result that Government proceeded to hold the estate khas paying malikana to them.

The plaintiff company contend that the lands in suit being part of a permanently settled estate cannot validly be subjected to a fresh assessment of land revenue, notwithstanding that they have reappeared after abatement of revenue had been granted while they were under water. The plaintiff company contend further that if the lands can be reassessed to revenue the Settlement Officer acting under S. 104 of the Bengal Tenancy Act could not fix a rent according to the assets of the tenures without regard to the fixed rent at which they were held. The Trial Judge accepted the plaintiff company's contentions on both points. In the High Court the plaintiff company succeeded on the second point but not upon the first, the learned Judges (Mukerji and Mitter, JJ.) being of opinion that in view of the abatement of revenue granted in 1871 the suit lands were "added" lands within S. 6 of the Act of 1847. In the six appeals which their Lordships are first considering, the Secretary of State in Council maintains the right of the Settlement Officer to disregard the contractual rate of rent and contends that the Civil Court has no jurisdiction in the matter.

The validity and character of the interest which the plaintiff company have in the lands in suit may first be noticed. By the Permanent Settlement Regulation (I of 1793) it was made clear that land held under the zemindar would be answerable for the revenue in common with the rest of the estate in case of default in payment by the zemindar, but that the rent payable to the zemindar would not be entered in Government records nor would the zemindar's grant or transfer be allowed to affect the rights or claims of Government any more than if it had never taken place. Government at the same time reserved the right to make regulations for the welfare of

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dependent taluqdars, raiyats and other cultivators of the soil. At first the zemindar was restricted in granting leases by a condition that the rent should not be fixed for a period exceeding ten years. This restriction was removed in 1812. The Bengal Patni Taluk Regulation (VIII of 1819) confirmed the validity of tenures at a rent fixed in perpetuity and proceeded to define, confirm and regulate the particular classes of such tenures called patni taluks and the dependent tenures thereunder called darpatnis, sepatnis and so forth. It may be noticed here that the recognition of the right to let and sublet at a fixed rent in perpetuity was given (as appears by the preamble to the Regulation) by way of abandonment of all intention or desire to have the old limitation to ten years enforced as a security to the Government revenue.

Two substantial questions, apart from a minor point on limitation of action to be considered later, arise for decision. First, is there power under Act IX of 1847 (which applies to the provinces of Bengal, Bihar and Orissa) to assess the lands in question as being lands "added to any estate paying revenue directly to Government" within the meaning of S. 6 of the Act mentioned? Secondly, if the lands are "added" to the estate within the meaning of S. 6, does this bring them within S. 104 of the Bengal Tenancy Act with the result that the Revenue Officer (subject to compliance with S. 103-A) has to settle fair and equitable rents for tenants of every class including all (or some) of the respondents?

Both questions involve elements of considerable difficulty. If the first, which their Lordships will proceed to examine, is answered in the negative, the second will not arise.

The Act of 1847 was considered with great care by the Judicial Committee of the Privy Council in an appeal from the High Court of Calcutta, entitled *Secretary of State for India* v. *Srimati Fahamidannissa Begum*[1]. The case was twice argued, and was finally disposed of before a Board of six consisting of Lord Watson, Lord Hobhouse, Lord Herschell, Lord Macnaghten, Sir Barnes Peacock and Sir Richard Couch. The headnote, the first part of which is taken textually from the judgment delivered by Lord Herschell is as follows:—

1. (1889) L.R. 17 I.A. 40: I.L.R. 17 Cal. 590 (P.C.).

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"Although by the legislation prior to 1847 it was intended to bring under assessment lands not included in the permanent settlement, whether they were waste or gained by alluvion or dereliction, yet all such lands as were comprised in permanently settled estates were to be rigorously excluded from further assessment. Lands so comprised which had become covered with water and afterwards reformed were not lands 'gained from the river or sea by alluvion or dereliction' within the meaning of the said legislation, which was confined to lands so gained 'since the period of the settlement'. The intention and effect of Act IX of 1847 were merely to change the mode of assessment, not to extend in any way the liability to assessment, so as to include in such liability land re-formed on the site of a permanently settled estate, the revenue of which had been paid without abatement since the permanent settlement."

The last sentence indicates the ground on which the appellant has sought to distinguish this case. In the present instance the zemindars as already mentioned have had the advantage of the deduction made in 1871 from the revenue of estate No. 523 of Rs. 4,034 in respect of the 28,087 bighas of land which had, as the phrase goes, "been washed away" from that estate. In the case decided by the judgment mentioned the proprietors of the mouza had obtained no such relief. In that case an area of land which in 1792 amounted to 10,042 bighas had been reduced to only 652 bighas in 1859 when the Thakbust survey (that is, the survey preliminary to the regular survey) was made. When the regular survey was made even the remnant of 652 bighas had disappeared. By the year 1877 some 2,000 bighas had reappeared, and it was these 2,000 bighas which the revenue officials had purported to assess. They had, erroneously as it turned out, disputed the identity of the land which had reappeared as part of the site of the permanently settled estate; and they had also contended that in any case the land was land that had "accreted since the last previous survey" and was therefore liable under the Act to be treated as "added land".

This last contention was based upon a view which had at one time found favour with the Courts of Bengal, namely, that the Act as a matter of procedure and evidence had made the former survey map conclusive as to the original limits of each permanently settled estate, and therefore made the comparison of the two maps by the revenue officer conclusive on the question of what had been washed away from and as to what had been added to the estate. This was an attractive view and it would have had the incidental advantage of preventing a quantity of litigation including the appeal now before their

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Lordships. It was, however, decisively negatived by the Full Bench of the High Court of Calcutta when the case which was the subject of the appeal to the Board just mentioned was before it (*Fahamidannissa Begum* v. *The Secretary of State for India in Council*[1]). The Full Bench, overruling three previous decisions, came to the conclusion that the comparison of the maps was not conclusive and that what was meant was that the comparison was "to set the Revenue Authorities in motion", and that they were then, on the best materials they could procure, to proceed to assess what they deemed to be assessible. This decision was accepted as correct by the Board and has since then been acted upon in Bengal; and it was not questioned before their Lordships, who must consider the question which now arises for decision on the footing that it is a correct interpretation of the Act.

It should be observed at the outset that Lord Herschell's judgment so far as it dealt with the question whether the Act of 1847 was applicable to land reformed on the site of a permanently settled estate laid no stress on the circumstance that the revenue assessed on the land had been paid without abatement since the permanent settlement. There are three stages in the reasoning which led the Board to its conclusion. First, the terms of S. 1 of the Act were said to show that the intention of the enactment was merely to alter the machinery of assessment and not to subject to assessment lands not liable thereto under the previous law. (It might perhaps be more accurate to substitute the word "mainly" for the word "merely".) Secondly, it was shown that under that law all lands comprised in permanently settled estates were entirely excluded from further assessment, and some solemn declarations of the Government in that sense were referred to. Thirdly, the terms of the Act of 1847 were examined with a view of showing, not only that no violence was done to the language of the enactment by rejecting a construction that would lead to the conclusion that owners of permanently settled estates might be liable to further assessment because they had suffered the misfortune to be deprived for a time of part of their lands by an incursion of the sea or river, but also that it would be straining the language to include in S. 6 of the Act

1. (1886) I.L.R. 14 Cal. 67 (F.B.).

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such a case as that with which their Lordships were then dealing, and that on the simple ground that lands originally part of a permanently settled estate "cannot be said to have been *added* to the estate to which they already belonged."

It should also be noted that the Full Bench of the High Court of Calcutta had unanimously come to the same conclusion as that embodied in Lord Herschell's judgment and for the same reasons; and they too did not rely on the fact that no remission of land revenue had been obtained. Mitter, J., expressed the conclusion on this point very succinctly:—"The provisions of Act IX of 1847 are," he said, "applicable to lands gained from the sea or from rivers by alluvion or dereliction. But land re-formed on the site of an estate, the proprietary right in which is vested in a private individual, does not fall under the category of lands gained from the sea or from rivers by alluvion or dereliction."

It seems to their Lordships that the reasons on which these judgments are based must be regarded as of general application to lands which formed part of a permanently settled estate, whether or not the *sadar jama* of the estate has been reduced because of land having been washed away from the estate, unless—and this seems to be the only possible qualification—it can be shown that when the assessment was reduced the lands which had been washed away or lost had in some way ceased upon the reduction being made to form a part of the original estate. If the lands have remained part of the original permanent settlement but have received a reduction of assessment under S. 5 it might indeed still have been argued if the matter were *res integra* that S. 6 is so worded that these lands on their reappearance after being submerged ought to be treated as "added" lands; but it seems to their Lordships that every line in the judgment of Lord Herschell applies on that hypothesis. They would still not be added lands in any true sense. That judgment has often been cited and followed, and it would seem much too late to question the force and validity of the reasons which led the Board in 1889 after much consideration to their conclusion. Nor do their Lordships see any good reason for doing so.

What then is the ground for contending that, when a reduction in the *sadar jama* is made under S. 5 in respect of lands washed away, there is any alteration in the title or

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ownership of those lands? It is to be noted that S. 5 is *prima facie* not dealing with a question of title at all. The general law on the subject of land "diluviated," to use the expression used in India in these cases, or on the subject of accretion is not in doubt. It was very clearly expressed in the year 1870 in a judgment of the Board delivered by Lord Justice James (*Lopez* v. *Muddun Mohun Thakoor*[1]). Dealing with Regulations which were in force prior to the Act of 1847 he showed beyond doubt that land forming part of a *mouzah* on the banks of the Ganges, which had gradually been washed away and submerged, but which had ultimately been re-formed on the original site, had never ceased to be the property of the original owner or his assigns. "The site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided the ownership of the site be ascertained." There is, however, a passage in the judgment which no doubt requires consideration in a proper case. It is as follows:—

"Their Lordships, however, desire it to be understood that they do not hold that property absorbed by a Sea or a River is, under all circumstances, and after any lapse of time, to be recovered by the old owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the Sea or River of the State, and so liable to the written law as to accretion and annexation."

Leaving aside for the moment the question of abandonment, it seems to their Lordships to be clear that S. 5 does not purport to transfer the title of the site which has been covered by water. All that is predicated as to the land is that it "has been washed away from or lost to any estate paying revenue directly to Government." In other words the cultivable soil (though of course not the site) has been washed away and the river now flows over the site, so that under normal circumstances no income can be derived from it. The legislature must be taken to have been well aware that this alone would not avail to shift the title of the site from the zemindar to the Government.

On the other hand the operation of S. 6 is very different. The assumption there is that land has been added to an estate paying revenue to the Government. In such a case in India under Regulation XI of 1825 it was provided that if gained by gradual accretion, "it should be considered an increment to the

1. (1870) 13 M.I.A. 467.

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tenure of the person to whose land or estate it is thus annexed". S. 6 refers to cases of gain, or acquisition by means of gradual accession of lands which, at any rate in a normal case, are assumed not to have been part of "the estate paying revenue directly to the Government," since the land is added to that estate. In a word S. 5 is dealing, *prima facie* at least, with a loss of cultivable value, while S. 6 is dealing with an acquisition of title by means of accretion.

Next, it is to be noted that when on inspection of the new map, made after an interval of not less than ten years from the date of the previous survey, it appears that land has been washed away from or lost to the revenue-paying estate, the revenue authorities are not given any discretion as to their action. Not only are the words mandatory, but they are directed "without loss of time" to make the deduction. There is no room here for an implication of any negotiation with the zemindars. No application whatever by them is necessary. Still less can it be right to postulate an implied bargain with them. They are entitled to say to the revenue authorities, "Observe, gentlemen, that we make no contract with you and that we give up none of our rights. All we desire is that you shall perform your statutory duties under the Act." In these circumstances their Lordships, with great respect to the opinions expressed by Mukerji and Mitter, JJ., are unable to take the view that the effect of an abatement of revenue taken for the portion of the estate washed away must be regarded as an abandonment of that portion of the estate for the benefit of the public domain. Abandonment must depend on the intention of the person alleged to be giving up a legal right. It cannot be right to draw such an inference from the attitude of a zemindar who simply pays the land revenue legally demanded from him by the revenue authorities. It may be observed that he may have heen paying land revenue for ten years in respect of lands wholly or partly submerged. He may be using the river bed for a wharf, a jetty, or some other building, and there may be evident signs that the river (or the sea) is now receding. The deduction to which he is entitled under S. 5 may be small as compared with the present value of the land covered as it is with water and trifling as compared with its future value if the river recedes. Yet the section is wholly silent as to any right being given up by the proprietor; and it

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seems to their Lordships that to make an implication that his title to the lands is being taken away is without justification. In the present case there is a further cogent reason against a presumption of abandonment. The appellants and their predecessors as permanent tenure-holders had continued to pay their rents without abatement to the proprietors who had accepted these unabated rents without demur. This seems to be quite inconsistent with the assumption that a part or parts of the estate from which the zemindars were continuing to receive rents had been abandoned to the Government.

It must be admitted that the Act in question was not very carefully framed, an observation which has been made before in reference to the legislation of Bengal at so early a date as 1847. Their Lordships have been perfectly aware of the fact that unless "added" lands within the meaning of S. 6 can be held to include lands which, having been the subject of an abatement of *sadar jama* under S. 5, have re-appeared above the waters, there is no express provision for any land revenue being payable in respect of those lands. For the reasons above given, and being satisfied that the title to the submerged lands has remained with the original proprietors, their Lordships cannot hold that the word "added" ought to be given so artificial a meaning as to include, in addition to lands the title to which has accrued in a true sense to the permanently settled estate, lands which have all along remained part of that estate, but have been exempted from revenue because they were at some previous date covered by water. It may be asked, what then is the position from the revenue point of view when the land or a portion of it emerges? There are two possible views; the first is that an implication may be derived from the Act that when lands reappear after a deduction has been given there ought to be a corresponding re-instatement of the proper proportion of the *sadar jama*; the second is that the case of reappearance has not been dealt with, and in other words that it is *casus omissus* in the Act. Their Lordships are unable to deal with the first view in the absence of any argument upon it: there are no doubt serious difficulties which will have to be duly considered if the Government makes a claim of the kind indicated. As to the second possible view it may be pointed out that until the Act came into force in Bengal, Bihar and Orissa in 1847 the Government

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of Bengal, while duly assessing with revenue alluvial increments to permanently settled estates, had not previously provided for any deduction being made from such estates if lands had been "washed away." In 1847 it may have been thought that the possibility of such lands reappearing in the case of permanently settled estates was not sufficiently important to need special legislation. In any case a possible defect of that kind in an Act concerned with taxation cannot alone be a ground for implying a clause imposing an obligation on the subject for which there is otherwise no warrant.

Their Lordships' conclusion on this part of the case is that the appeals in the Title Suits Nos. 21, 94, 95, 450, 451 and 454 must be dismissed with costs.

The remaining eight appeals arise out of four money suits whereby the plaintiff company sought repayment from Government of rents which Government had realised from them on the basis of the settlement proceedings and in addition to the fixed rents of their tenures. Four of these eight appeals are brought by the Secretary of State in Council and are governed by the result of the six appeals already dealt with by their Lordships. These are appeals Nos. 9, 12, 13 and 14 of 1931, which accordingly fall to be dismissed.

In the four appeals brought by the plaintiff company (Nos. 23, 21, 22 and 26 of 1931) they complain that the Trial Court and the High Court have by an error applied against them Art. 16 of the First Schedule to the Limitation Act (IX of 1908). By the terms of that article it applies to suits "against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue or on account of demands ecoverable as such arrears." For such suits the period of limitation prescribed is one year from the time when the payment is made. If this article be not applicable to the present cases, learned Counsel for the Secretary of State do not resist the plaintiff company's claim as being barred in whole or in part by any other article. The sums claimed by Government were claimed as rents payable by the plaintiff company for lands held by them, being the rents "settled" by the Settlement Officer under S. 104 of the Bengal Tenancy Act (VIII of 1885). Such rents are not arrears of revenue and unless it can be shown that by some enactment they have been made to

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come under that description or have been made recoverable as arrears of revenue, Art. 16 cannot be applied to them. The learned Trial Judge appreciated that the money realised was really "patni rent" but considered that as Government was holding khas the lands of a recusant proprietor the demand was recoverable as arrears of revenue. This, however, would not follow unless some enactment has provided to that effect. In the High Court the Bengal Land Revenue Sales Act (Bengal Act VII of 1868) which amended and extended an Act of similar title—namely, Act XI of 1859, was thought to have supplied the necessary provision by defining the word "revenue" to cover "every sum annually payable to Government by the proprietor of any estate or tenure in respect thereof." This would mean that the plaintiff company's tenures could, for arrears of rent, be sold by the Collector without "certificate procedure" and without reference to the Civil Court, in like manner as an estate may be sold for default in payment of the revenue. Learned Counsel for the plaintiff company disputed this reading of the Acts of 1859 and 1868, maintaining that as his clients did not hold directly under Government they were not "proprietors" within the meaning of the latter Act. Upon this point learned Counsel for the Secretary of State did not seek to uphold the High Court's view and their Lordships have not had occasion to construe the Acts in question. He argued only that the claim to the enhanced or settled rents came within the Bengal Public Demands Recovery Act (Ben. Act III of 1913) citing in particular Art. 8 of the First Schedule thereto. This, however, would not, in their Lordships' view, assist to bring into operation Art. 16 of the First Schedule to the Limitation Act which requires for its application that the demand, if not for arrears of revenue, should be "recoverable as such arrears." To show that it is recoverable as a "public demand" is not to the point. The result is that these four appeals by the plaintiff company should be allowed, the decrees of the High Court set aside, and the decrees of the Trial Courts in suits 440 of 1924, 104 and 105 of 1925 and 42 of 1926 varied by including those items of the plaintiff company's claim which have been disallowed as barred by limitation: interest at 6 per cent. per annum from date of each payment till realisation will be allowed on such additional items as well as on the items already

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decreed: also the usual interest on the decretal sum (including costs) at 6 per cent. If not sooner ascertained the exact sum to be decreed in each suit will be ascertained, in default of agreement, by or under direction of the High Court. In lieu of the order for costs made by the Trial Judge in these four suits the order will be that the plaintiff company do get their costs of the Trial Court: they will also get their costs in these cases of the appeals to the High Court.

Their Lordships will humbly advise His Majesty in accordance with their conclusions on the various appeals as above stated.

The plaintiff company will get from the Secretary of State in Council their costs of the consolidated appeal. With regard to the appeal arising out of a suit No. 452 of 1922 in which special leave to appeal was granted on the 26th June, 1933, which appeal was subsequently abandoned, the plaintiff company must pay the Secretary of State's costs in connection with that order and there will be a set off as regards these costs against the costs of the consolidated appeal which the Secretary of State must pay to the plaintiff company. There will be no order for costs in the case of respondents Nos. 5, 6, 7, 8 and 19 (4) (minors who appear by Profulla Kumar Guha) who did not take part in the hearing before either Court in India and who need not in their Lordships' opinion have separately contested this appeal.

Solicitors for Appellant: *The Solicitor, India Office.*

Solicitors for the Company: *Burton, Yeates & Hart.*

Solicitors for the remaining Respondents: *Francis & Harker.*

R. C. C. —— *Orders modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE VARADACHARIAR.

D. Doss and others .. *Appellants** (*Respondents*)

v.

C. P. Connell and W. A. P. Lobo (Joint Official Liquidators) .. *Respondents* (*Applicants*).

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Indian Companies Act (*VII of 1913*), *Ss. 235 and 281—Company—Incorporation of—Legal adviser and advisory director—Eight other directors—*

* O. S. Appeals Nos. 26, 27 and 28 of 1937. 12th August, 1937.

Chairman, one of them—Certificate under S. 103 obtained on a false declaration by advisory director—Other directors aware that declaration false—Company commencing business—Security deposits by employees—Misappropriation of, by advisory director—Company incurring liabilities between date of commencement and closing—Liquidation of company—Directors, if to make good the two losses to the company — Wilful negligence—Meaning of—Directors, how far entitled to rely on chairman and managing director—Scope of S. 281—Directors acting honestly but not reasonably—If can be relieved under S. 281.

A limited company was promoted by one *N*, a barrister, for the purpose *inter alia* of doing all kinds of banking business. *N* was at the time and has since remained an undischarged insolvent. He arranged that he should be appointed legal adviser to the company and the " advisory director". There was no general application made to the public to subscribe shares. There were eight other directors and out of them one *M* was the chairman. The nominal capital was Rs. 1,00,000 divided into 2,000 shares of Rs. 50 each. Of the Rs. 50 payable on each share Rs. 10 was payable on application, Rs. 15 on allotment and the balance in 5 equal instalments. The articles of association provided (1) that the business might be commenced as soon as 50 shares had been subscribed; (2) that the chairman should have the power of appointing, promoting, reducing, suspending and removing all officers of the company subject to the approval of the Board of directors and should have the power to fix all remunerations, salaries and wages to be paid by the company. Before the company was incorporated a draft agreement had been prepared under which the company was to advance to *N* a sum of Rs. 10,000 on the security of his interest in the assets of another business. I.L.T., Ltd., which was vested in the Official Assignee in the insolvency of *N*. The arrangement was that of this advance Rs. 5,000 should be paid to *N* to enable him to redeem the assets of I.L.T., Ltd., from the Official Assignee. After the incorporation of the company the agreement was executed and in due course *N* executed the requisite mortgage-deed.

Some months before the starting of the business, *N* advertised for applications for posts on the staff of the company. The successful candidates were to deposit security for the proper performance of their duties. Number of appointments were made and the appointees furnished securities to the extent of Rs. 10,720. Of this *N* put Rs. 4,988-7-2 into his own pocket. The company had no right to utilise these moneys for its own purposes. Art. 95 provided for the usual indemnity to directors for anything done by them, except where loss has been incurred as the result of wilful neglect or wilful default on their part. The certificate permitting the company to start business was obtained on the 4th September, 1933, but it was obtained on a false declaration by *N* that the condition of S. 103 of the Companies Act had been fulfilled, though as a matter of fact, the directors had not all paid the amounts due by them. It was found (1) that the directors had knowledge of the obtaining of the certificate, and of the fact that business commenced on the 7th September; (2) that they knew that the directors had not paid what was due in respect of their shares and that they must be deemed to know that the company had no right to commence business; and (3) that they knew that *N* was an insolvent but did not know till a late stage that *N* had utilised the deposits towards the Rs. 5,000 payable to him to redeem I.L.T., Ltd. and that without using it for the purpose he had misused it. The business commenced on 7th September, 1933, and closed on 16th February, 1934. In between liabilities to the extent of Rs. 6,331-9-3 were incurred by the company. The official

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liquidator took out a misfeasance summons under S. 235 against the directors for recovery of these two sums.

Held, (1) that as regards Rs. 4,988-7-2, the directors were not liable to pay the Rs. 4,988-7-2 because they were justified in trusting the chairman and *N* to deal properly with the employees and therefore they were not guilty of wilful negligence. Observations of Romer, L.J., in *City Equitable Fire Insurance Co., Ltd.*, In re, (1925) 1 Ch. 407 at 427, as to what is meant by wilful negligence followed.

Observations of Lindley, M.R., in *National Bank of Wales, Limited*, In re, (1899) 2 Ch. 629 and of Lord Davey in *Dovey* v. *John Cory*, (1901) A.C. 477, as to the extent to which a director can rely upon the chairman and general manager of the company, followed.

(2) But as regards Rs. 6,331-9-3, the directors were liable, because, though the minimum subscription had been subscribed, the amounts due on them by the directors had not all been paid and the certificate for commencing the business had been obtained by reason of a false declaration made by *N*. The directors who were aware that their quota had not been paid must be deemed to know that the company had no right to commence business and in those circumstances by their having allowed the company to open the doors and keep them open for months, with the knowledge that the bank was utilising its customer's moneys dishonestly, they were guilty of wilful negligence and liable to pay that amount. The directors could not even be relieved under S. 281 because though they have acted honestly, they had not acted reasonably.

Appeals against the order of the Hon'ble Mr. Justice Gentle dated the 5th day of February, 1937, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2035 of 1935 in O. P. No. 48 of 1934 in the matter of the Indian Companies Act (VII of 1913) and in the matter of the General Banking Corporation, Limited, Madras.

K. Krishnaswamy Aiyangar, E. Antony Lobo, S. R. Subramaniam, K. C. Subramaniam Chettiar, O. Rajavelu Chetty and *A. Ramaswawy* for Appellants.

A. Westmorland Wood for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal and appeals Nos. 27 of 1937 and 28 of 1937 arise out of a misfeasance summons taken out by the Official Liquidators of the General Banking Corporation, Limited, against the directors of that company. The appeals have been heard together and it will be convenient to deal with them in one judgment.

The company was registered on the 11th May, 1933, for the purpose *inter alia* of doing all kinds of banking business. The promoter was one P. K. Nair, a barrister at law, who was at the time and has since remained an undischarged insol-

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vent. Nair who was the ninth respondent in the proceedings before the learned trial judge, arranged that he should be appointed legal adviser to the company and the "advisory director". A prospectus was prepared, but fortunately there was no general application made to the public to subscribe shares. There were eight other directors, who were respondents 1 to 8. Two of them respondents 3 and 5 (B. Gulabchand Sowcar and M. L. Ranganayakulu) were not served and they took no part in the proceedings. The fourth respondent, A. Madhava Rao, who was the Chairman of the company, and Nair, absconded before the proceedings commenced. The official liquidators sought to make all the respondents, except respondents 3 and 5, liable under S. 235 of the Indian Companies Act, 1913, for (1) a sum of Rs. 4,988-7-2 which has been misappropriated by Nair; and (2) a sum of Rs. 6,331-9-3 representing liabilities incurred by the company from the date it started business until the date of it closed its doors. The certificate permitting business to be started was issued on the 4th September, 1933, and business was actually commenced on the 7th of that month. The bank's doors were closed on the 16th February, 1934; a petition for winding up was presented on the 5th March of that year and on the 6th April, 1934, a compulsory winding up order was passed.

Mr. Justice Gentle before whom the case came held that respondents 1, 2 and 4 (Rao Bahadur M. C. Rajah, V. Venkateswara Sastrulu and A. Madhava Rao) were each liable to pay the sum of Rs. 4,988-7-2 claimed as the first item and respondents 2, 4 and 6 (the sixth respondent being D. Doss) were each responsible for the payment of the sum of Rs. 6,331-9-3 and the 2nd item claimed. He also held that in respect of the sum of Rs. 6,331-9-3, the first respondent was liable to pay Rs. 2,833-9-9, and the seventh respondent Rs. 5,408 these sums being calculated in accordance with the dates on which they resigned from the Board of directors. Appeal No. 26 is the appeal of the sixth respondent in respect of the sum of Rs. 6,331-9-3. Appeal No. 27 is by the seventh respondent in respect of the sum of Rs. 5,408; and appeal No. 28 embraces the appeals of the first and second respondents in respect of the sum of Rs. 4,988-7-2, that of the first respondent in respect of the sum of Rs. 2,833-9-9 and that of the second respondent in respect of the sum of Rs. 6,331-9-3. The

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fourth respondent has not appealed and the order of the learned judge has become final as against him.

The nominal capital of the company was Rs. 1,00,000 divided into 2,000 shares of Rs. 50 each. Of the Rs. 50 payable on each share, Rs. 10 was payable on application, Rs. 15 on allotment and the balance in five equal instalments. The articles of association provided that the business of the company might be commenced as soon as 50 shares, that is, Rs. 2,500 had been subscribed. Before the company was incorporated a draft agreement had been prepared under which the company was to advance to Nair a sum of Rs. 10,000 on the security of his interests in the assets of the Indian Law Times, Limited, and a life policy of Rs. 10,000. The Indian Law Times, Limited, had been acquired by Nair and insolvency arose in connection with this business. The arrangement was that of the loan of Rs. 10,000, Rs. 5,000 should be paid to Nair for the purpose of enabling him to redeem the assets of the Indian Law Times, Limited, from the hands of the Official Assignee. After the incorporation of the company the agreement was executed and in due course Nair executed the requisite mortgage deed. Although business was not started until the 7th September, 1933, advertisements were inserted by Nair in the local press on the 21st June and 15th July, 1933, calling for applications for posts on the staff of the company. It was intimated that the successful candidates would be required to deposit security for the proper performance of their duties. Applications were received in the course of July and August, and a number of appointments was made, the persons appointed furnishing security in the aggregate sum of Rs. 10,720. I should mention that Art. 63 of the articles of association provided that the chairman should have the power of appointing, promoting, reducing, suspending and removing all officers of the bank, subject to the approval of the Board of directors, and should have the power to fix all remunerations, salaries and wages to be paid by the company. Subscriptions were received for only 65 shares. The subscriptions by the respondents were as follows:—

Respondent No.	No. of shares.
1	5
2	5
3	20

Respondent No.		No. of shares.
4	..	10
5	..	5
6	..	5
7	..	5
8	..	5

Respondents 1, 2, 4 and 6 paid nothing in respect of their shares. The third respondent paid Rs. 250 on account of the Rs. 1,000 owed by him in respect of his 20 shares, and the seventh respondent paid Rs. 30 on account of the Rs. 250 owed by him in respect of his five shares. Respondents 5 and 8 appear to have paid for their shares in full. The actual capital which the company had when it started business was Rs. 780.

The first item of the claim, namely, the sum of Rs. 4,988-7-2 represents security deposits provided by the employees which Nair put into his own pocket. The company had no right to utilise these monies for its own purposes and the fact that Nair misappropriated them is common ground. The learned Judge held that respondents 1, 2 and 4 were responsible for this sum, because they had not used reasonable care in carrying out their duties. He considered that it was incumbent on them to see that the company's moneys were in a proper state of investment and that Nair being an undischarged insolvent should not have been allowed to take charge of the security deposits of the employees. The learned Judge held as a fact that the second and fourth respondents had knowledge of Nair's insolvency, but he was not satisfied that the first respondent had such knowledge. He, however, held that they were all liable as they took no steps to see that a responsible person was attending to the company's finances. They had all failed to carry out their duties, and were guilty of the grossest negligence. The position with regard to this sum of Rs. 4,988-7-2 is altogether different from the position with regard to the sum of Rs. 6,331-9-3 which I will deal with separately.

With regard to the first sum, the learned Advocate for respondents 1 and 2 (appellants here) contends that the learned trial Judge has misconceived the law with regard to the duties of directors. He says that on the authorities it must be shown that the directors had knowledge of the facts and that they acted wilfully despite their knowledge. Before passing to the authorities I should refer to Art. 95 of the articles of

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association. This article has been very badly drafted, but it is intended to comprise the usual indemnity to directors for anything done by them, except where loss has been incurred as the result of wilful neglect or wilful default on their part, and it is accepted by both sides, that it has this effect. The duties of directors and what is meant by wilful negligence were dealt with at length by Romer, J., in the case of *City Equitable Fire Insurance Co., Ltd.*, In re[1]. The learned Judge who discussed the authorities there pointed out that in order to ascertain the duties that a person appointed to the board of an established company undertakes to perform, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors and the other officials of the company, provided always that this distribution is a reasonable one in the circumstances, and is not inconsistent with any express provisions of the articles of association. In discharging the duties of his position thus ascertained, a director must, of course, act honestly; and he must also exercise some degree of both skill and diligence. The learned Judge, however, pointed out that (1) a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; (2) he is not bound to give continuous attention to the affairs of the company, his duties being of an intermittent nature to be performed at periodical meetings; and (3) in respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. Dealing with the question of wilful negligence, the learned Judge observed (page 434 of the report) :—

> "An act, or an omission to do an act, is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty, and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty."

This view was affirmed by the Court of Appeal consisting of Pollock, M.R., Warrington, L.J. and Sargant, L.J. With

1. (1925) 1 Ch. 407 at 427.

regard to the question whether a director is justified in trusting the officials of the company, I would also refer to the observations of Lindley, M.R., in the case of *National Bank of Wales, Limited,* In re[1]:

"Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them, as well as by those below them, until there is reason to distrust them. We agree that care and prudence do not involve distrust; but for a director acting honestly himself to be held legally liable for negligence, in trusting the officers under him not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden on honest business men."

This case was taken to the House of Lords (*Dovey* v. *John Cory*[2]) Lord Davey there said:—

"I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in *Hallmark's case*[3] and by Chitty in In re *Denham & Co.*[4], that directors are not bound to examine entries in the company's books. It was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference."

Now what is the position here? As I have pointed out, the matter of the appointment of the staff was in the hands of the chairman. It is not suggested that respondents 1 and 2 had any reason whatsoever to suspect the integrity of the chairman. It is also not suggested, apart from his insolvency, that they had any reason to suspect the integrity of Nair. It is true that Nair was an undischarged insolvent, but insolvency does not necessarily mean that a man is a dishonest man. There is here an entire absence of anything which would point the finger of suspicion to either the chairman or to Nair in the matter of these appointments. There was certainly no reason for any of the directors to suspect that Nair would utilise the security deposits for his own purposes, and there is no reason to suspect that the chairman knew that he was so doing. It is abundantly clear from the minutes that when it was discovered that Nair had utilised these security deposits for his own

1. (1899) 2 Ch. 629 at 673.
2. (1901) A.C. 477 at 492.
3. (1878) 9 Ch. D. 329.
4. (1883) 25 Ch. D. 752.

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purposes the matter was immediately taken up by the directors and he was called upon to repay. Nair appears to have utilised Rs. 4,500 of the deposits towards the Rs. 5,000 which was to be paid to him under the mortgage for the purposes of redeeming the assets of the Indian Law Times, Limited, but instead of redeeming those assets he stuck to the money. But nobody knew about this until afterwards. The authorities show that where there is an indemnity clause of the kind we have here not only must a director be guilty of negligence, but he must know that he is committing a breach of duty or is recklessly careless in the matter. Romer, J., at page 468 of the report of the *City Equitable Fire Iusurance Company's case* emphasised this. It seems to us that respondents 1 and 2 were justified in trusting the chairman and Nair to deal properly with the employees and therefore it cannot be said that they were guilty of wilful negligence in so doing. In these circumstances we consider that the appeal so far as it relates to the sum of Rs. 4,988-7-2 must be allowed.

But entirely different considerations arise with regard to the sum of Rs. 6,331-9-3. In this connection it is necessary to refer to S. 103 of the Indian Companies Act. This section provides that a company shall not commence any business or exercise any borrowing powers unless (*a*) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and (*b*) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription or, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash; and (*c*) there has been filed with the registrar a duly verified declaration by the secretary or one of the directors, in the prescribed form, that these conditions have been complied with. In this case the minimum subscription had been subscribed, but the amounts due on them by the directors had not all been paid and the certificate permitting the company to commence business had been obtained as the result of a false declaration made by Nair. The learned Judge found that all the respondents knew of the obtaining of this certificate and

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that they were fully aware of that the company had started business on the 7th September, 1933. They therefore all wilfully permitted the company to carry on business on the strength of a certificate obtained by a false declaration. We have no doubt that the respondents 2, 6 and 7 had knowledge of the obtaining of the certificate and of the fact that business commenced on the 7th September, 1933. With regard to the first respondent it is said that he was actually in Madras only on the 26th, 27th and 28th of July, and between the 13th and 18th of August. But it is clear on his own evidence that he returned to Madras on the 28th September. We have no doubt that he was fully aware by that date, if not before, that the certificate had been obtained that business was being carried on. We are also satisfied that these four respondents were fully aware that the directors had not paid what was due in respect of their respective shares and that they knew that the company had no right to commence business. In any event they must be deemed to know the law. In *Burton* v. *Bevan*[1] which was also a case of misfeasance Neville, J., remarked:—

"I think it is immaterial whether the director had knowledge of the law or not. I think he is bound to know what the law is, and the only question is; did he know the facts which made the act complained of a contravention of the statute?"

In the present case the learned trial Judge has held that they did know and we are in entire agreement with him. This means that the directors allowed this company to open its doors and keep them open for months knowing full well that S. 103 had not been complied with, that the company had no capital with which to carry on business and that deposits made by customers in current and other accounts were being utilised by the management for the payment of wages and current expenses without any likelihood of the company being able to pay back such monies. In other words they knew that the bank was utilising its customer's monies dishonestly. As the result of the company having obtained by means of a false declaration a certificate allowing it to carry on business and as the result of the respondents having allowed the company to keep open its doors the company has suffered loss to the extent of Rs. 6,331-9-3. We are of opinion that respondents 1,

1. (1908) 2 Ch. 240.

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2, 6 and 7 have been guilty of wilful negligence and they are liable to make repayment under S. 235 of the Indian Companies Act. We therefore agree with the finding of the learned trial Judge on the second part of the case.

We have been asked to relieve these respondents from the consequences of their wilful negligence, under the provisions S. 281 of the Indian Companies Act. That section provides that if in a proceeding for negligence, default, breach of duty or breach of trust it appears to the Court hearing the case that the person may be liable but has acted honestly and reasonably and ought fairly to be excused, the Court may relieve him wholly or in part from his liability. This power to relieve is placed in the hands of the Court when it is convinced that a person has acted honestly and reasonably. In this case even if it be said that these respondents acted honestly, it cannot be said that they acted reasonably and we are unable to grant them any relief under this section. The order of the learned Judge against the respondents 1, 2, 6 and 7 in respect of the second item of the claim will therefore stand. As the appellant have succeeded in part and failed in part, we do not propose to make any order as to costs. The liquidators will have their costs out of the assets of the company.

S. V. V. —— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE NEWSAM.

Adiraju Mallikarjana Rao .. *Petitioner**

v.

Somavaram Co-operative Society No. H-774 represented by the President Somavarapu Chandramouleswara Rao and another .. *Respondents (Respondents in do.).*

Adiraju Mallikarjana Rao v. Somavaram Co-operative Society.

Madras Co-operative Societies Act (VI of (1932), S. 51—Certiorari—*Dispute between society and an ex-officer—Jurisdiction of Deputy Registrar of Co-operative Societies to decide such a dispute—Delay in petitioning to the High Court for* certiorari *to quash the award and decree of the Deputy Registrar—Conduct of party sufficient to preclude Court from issuing the writ as* ex debito justitiae—*Discretion of the High Court in the circumstances.*

Where the Deputy Registrar of Co-operative Societies gave an award on a dispute between an ex-officer of the society and the co-operative society

* C. M. P. No. 2899 of 1936. 7th September, 1937.

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and the aggrieved party delayed in questioning the jurisdiction of the Deputy Officer to decide the matter for more than two years after the matter had been referred to the Deputy Registrar under S. 51 of the Act till in execution of the award and decree his property was brought to sale and delivered to auction purchasers, but filed a petition in the High Court to quash the proceedings of the Deputy Registrar by issuing a writ of *certiorari*.

Held, (1) that the Deputy Registrar had no jurisdiction under S. 51 of the Act to decide a dispute between an ex-officer and the Co-operative Society. *Narayana Aiyar* v. *The Co-operative Urban Bank, Ltd., Tinnevelly*, (1935) 69 M.L.J. 726, followed.

(2) That the petitioner had so conducted himself as to preclude this Court from exercising its discretionary power in issuing a writ of *certiorari* in his favour.

The test is whether the applicant armed with a point either of law or of fact, which would oust the jurisdiction of the lower Court, has elected to argue on the merits; if he has done so he cannot obtain a writ of *certiorari ex debito justitiae*.

Latchmanan Chettiar v. *Commissioner, Corporation of Madras*, (1926) 51 M.L.J. 742: I.L.R. 50 Mad. 130 (F.B.), followed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records and quashing the proceedings in claim No. 2 of 1934 on the file of the Court of the Deputy Registrar of Co-operative Societies, Bezwada, or issuing a writ of prohibition prohibiting the respondent from taking further proceedings in any manner with reference to the orders made or decree passed in the said claim No. 2 of 1934 for purpose of recovering the amount from the petitioner herein.

M. Appa Rao for Petitioner.

V. Govindarajachari, S. Srinivasachari, K. S. Champakesa Aiyangar for the Government Pleader (*K. S. Krishnaswami Aiyangar*) for Respondents.

The Court made the following

ORDER.—This is an application for a writ of *certiorari* directed to the Somavaram Co-operative Societies and the Deputy Registrar of Co-operative Societies. I am invited to quash the award of the Deputy Registrar to whom a dispute between petitioner (ex-president of the Society) and the Co-operative Society had been referred on the ground that the Deputy Registrar has no jurisdiction under S. 51 of the Co-operative Societies Act to decide such a dispute.

The facts are briefly as follows:—The petitioner as president of the Society had made loans to four persons, which were irrecoverable. Petitioner ceased to be President on 17th July, 1931. Over two years later (namely, on 25th November,

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1933), the Co-operative Society resolved to refer the matter to the arbitration of the Registrar and claim No. 2 of 1934 was filed very early in 1934 against petitioner. For a year this claim was pending before the Deputy Registrar, being eventually decided only on 13th March, 1935, in a long judgment which dealt with the merits fully, from which it does not appear that any objection was ever taken by petitioner to the jurisdiction of the Deputy Registrar under S. 51. It is on the other hand clear that petitioner resisted the claim and fought it on the merits. After the claim had been decided in March, 1935, there was more than a year's delay on petitioner's part in applying to this Court for a writ of *certiorari.* An ill-advised revision petition was filed in September, and dismissed in November. During this interval of a year petitioner's property was sold in execution of the Deputy Registrar's decree, the sale was confirmed and the property delivered to the auction purchasers. The present petition was filed only on 5th May, 1936.

Now it has been held in *Narayana Aiyar* v. *The Co-operative Urban Bank, Ltd., Tinnevelly*[1], that a Registrar has no jurisdiction under S. 51 of the Act to decide a dispute between a Co-operative Society and an ex-officer. This decision, if I may say so with respect, seems to me, to be correct and I therefore propose to deal with this petition on the assumption that the Deputy Registrar had in fact no jurisdiction to pass a decree.

It still remains to consider whether I should interfere to quash his proceedings. The facts set out above show that petitioner has not only submitted to jurisdiction, apparently without any protest but has by his subsequent conduct acquiesced in the decision for a considerable period of time. There is no foundation for his present statement that he challenged the Deputy Registrar's jurisdiction beyond the fact that a statement to the effect occurs in his affidavit filed in support of this petition, and I do not think it would be proper to accept that as a proved fact merely because the respondents in their counter-affidavits omitted to challenge the statement.

Petitioner argues that being a person aggrieved by the unwarranted usurpation of jurisdiction he is entitled to

1. (1935) 69 M.L.J. 726.

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ex debito justitiae—as a matter of right—to a writ, and he relies for this proposition in *Rex* v. *Richmond Confirming Authority: Howitt*, Ex parte[1], where a distinction is drawn between writs applied for by persons interested and writs demanded by persons aggrieved. But in that case the effect of gross delay as in this case, by a person aggrieved in applying for a writ was not decided. The learned Lord Chief Justice concluded the judgment in that case in these words:

"On the facts there is nothing sufficiently shewn to raise the point of law argued by Sir John Simon (namely, the effect of delay when the writ goes *ex debito justitiae*) and it is not desirable to give a decision in express terms where the point does not really arise."

But in the present case the conduct of petitioner is such as to leave no room for any doubt that for over two years after the case had been referred under S. 51 to the Deputy Registrar it never even occurred to him that this officer had no jurisdiction. He took his chance of success before that tribunal and it was not until he had failed and until the adverse decree had been executed that he elected to move this Court for a writ. My attention has been drawn to the case reported in *Latchmanan Chettiar* v. *Commissioner of Corporation of Madras*[2]. It was there pointed out by a Bench of three judges that *prima facie* the English decisions establish the proposition that in such circumstances the applicant cannot obtain a writ of *certiorari ex debito justitiae*, but that the Court exercises a purely discretionary power. The test, it was said, is whether the applicant armed with a point either of law or of fact, which would oust the jurisdiction of the lower Court, has elected to argue, the case on its merits before that Court. Judged by that test I have no hesitation in finding that the petitioner has so conducted himself as to preclude this Court from exercising its discretionary power in his favour. The petition is therefore dismissed with costs. (Two sets Advocates fees 35 each.)

K. C. —— *Petition dismissed.*

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1. (1921) 1 K.B. 248.
2. (1926) 51 M.L.J. 742: I L.R. 50 Mad. 130 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE NEWSAM.

Mallimoggala Venkataramiah and others .. *Petitioners.**

Venkata-ramiah, *In re.*

Indian Penal Code (XLV of 1860), Ss. 109 and 120-B—Charge of criminal conspiracy—Previous sanction required in non-cognizable offences (S. 196-B, Criminal Procedure Code)—Trial and conviction without previous sanction illegal—Where matters have gone beyond the stage of conspiracy, offence becomes one of actual abetment—Section applicable is S. 109.

In a criminal case six persons were charged with criminal conspiracy, but the point taken was that since no previous sanction of the Local Government or of the District Magistrate had been obtained as required by S. 196-A, Criminal Procedure Code, in non-cognizable cases, the committal to Sessions should be quashed,

Held, that though the conviction for criminal conspiracy under S. 120-B, Indian Penal Code, could be set aside in the absence of proof that prior sanction to initiate the proceedings had been obtained, following *Varadarajulu Naidu* v. *King-Emperor*, (1919) 37 M.L.J. 81: I.L.R. 42 Mad. 885 (F.B.), still the facts of the present case allowed of its disposal on another ground, namely, that the Magistrate below had erred in applying S. 120-B to the case instead of S. 109, because the matter had gone beyond the stage of mere conspiracy and offences were alleged to have been actually committed in pursuance thereof.

Where an offence is alleged to have been committed by more than two persons, such of them as actually took part in the commission should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy should be charged with the offence of abetment under S. 109, Indian Penal Code.

Petition praying that in the circumstances stated therein the High Court will be pleased to quash the committal order of the Court of the Stationary Sub-Magistrate of Ellore dated 31st July, 1937, in P.R.C. No. 8 of 1936.

K.S. Jayarama Aiyar and *G. Gopalaswamy* for Petitioners.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER—This is an application to quash the committal of six persons to stand their trial at the Court of Sessions, West Godawari. Four of them have been committed on a charge of extortion by putting a person in fear of death (S. 386, Indian Penal Code) and all six of them on a charge of criminal conspiracy (S. 120-B).

The point taken before me is that under S. 196-A, Criminal Procedure Code, no Court shall take cognisance of the offence of criminal conspiracy where the object of the conspiracy is to commit a non-cognizable offence unless the

* Crl. M. P. No. 976 of 1937. 17th September, 1937.

previous sanction of the Local Government or of the District Magistrate has been obtained. The offence punishable by S. 386, Indian Penal Code, is (rather strangely) non-cognizable. Admittedly, no sanction to prosecute or to initiate these proceedings was obtained. Admittedly also this objection to the Court's jurisdiction was not taken in the lower Court, but has been made for the first time in this petition.

Now it has been held in *Abdul Rahaman* v. *Emperor*[1] that failure to comply strictly with S. 196-A, Criminal Procedure Code, is not a sufficient ground for quashing proceedings. If proceedings are initiated without formal sanction and end in the conviction of certain persons for criminal conspiracy, the conviction should, it was said, be upheld, unless it can be shown that any one of the persons convicted was prejudiced by the formal defect complained of. If I may say so with respect, this is a sound doctrine. The offence of criminal conspiracy is *sui generis*. No overt act need be proved. S. 120-A is a comparatively new section in the Indian Penal Code and may be thus analysed. A conspiracy to commit a criminal offence is always a criminal conspiracy punishable as such under S. 120-B even though nothing is done in pursuance thereof. Conspiracy to do an illegal act (which by the definition of 'illegal' in S. 43 includes a tort) or a lawful act by illegal means only amounts to criminal conspiracy and is only punishable under S. 120-B when some act (not an offence by itself) is done by one of the parties to the conspiracy in pursuance thereof. Now there is an obvious danger that charges of criminal conspiracy might be lightly made, savouring of persecution rather than of prosecution. And it was with a view to safeguarding citizens against such persecution on frivolous charges of criminal conspiracy that S. 196-A, Criminal Procedure Code, was enacted at the same time as S. 120-B, Indian Penal Code, insisting upon the previous approval of Government or of some senior and specially empowered Magistrate before such proceedings can be even initiated. If this safeguard is ignored by Magistrates they should be suitably admonished. But when a case has been initiated and has ended in conviction, it is obvious that there never was any innocent person to be protected from persecution. In other words

1. (1935) I.L.R. 62 Cal. 749.

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S. 196-A was designed to safeguard persons from frivolous accusations of criminal conspiracy, not as a loophole of escape for persons committed after full magisterial inquiry on a charge of criminal conspiracy or convicted after full trial of criminal conspiracy.

But it has been held in *Varadarajulu Naidu* v. *King-Emperor*[1] by a Bench of this Court that a sanction to prosecute for criminal conspiracy, given after the filing of the complaint, does not fulfil the requirements of S. 196-A. This decision follows *Barindra Kumar Ghose* v. *Emperor*[2] and is an authority for the position that a conviction for criminal conspiracy should be set aside in the absence of proof that prior sanction to initiate the proceedings had been obtained. This decision is binding upon me.

But the facts of the present case allow of its disposal on another ground. In my judgment Ss. 120-A and 120-B have been quite wrongly applied to this case and have no bearing at all. Where the matter has gone beyond the stage of mere conspiracy and offences are alleged to have been actually committed in pursuance thereof, these two sections are wholly irrelevant. Conspiracy it should be borne in mind is one form of abetment (*see* S. 107, Indian Penal Code) and where an offence is alleged to have been committed by more than two persons, such of them as actually took part in the commission should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy should be charged with the offence of abetment under S. 109, Indian Penal Code. The explanatian to S. 109 makes this quite clear. An offence is said to be committed in consequence of abetment, when it is committed in pursuance of the conspiracy, and the abettor by conspiracy is made punishable (under S. 109) with the punishment provided for the actual offence.

The learned Magistrate has thus erred in applying S. 120-B to this case. He should properly have used S. 109, for S. 120-B only applies where no offence has been actually committed and it is only in the latter rare cases where no crime has been committed in pursuance of a criminal conspiracy that sanction to initiate proceedings is necessary as some safeguard against

1. (1919) 37 M.L.J. 81: I.L.R. 42 Mad. 885 (F.B.).
2. (1909) I.L.R. 37 Cal. 467.

frivolous prosecution. But the prosecution in this case alleges that an offence has been committed and further that it has been committed in pursuance of a conspiracy. No sanction to initiate prosecution for a substantive offence is ever required. That is an elementary rule of law. All that is necessary here is that the proper section (S. 109, Indian Penal Code) should be applied to the facts and that the misuse of S. 120-B should be pointed out. Venkataramiah, *In re.*

I dismiss this petition with a direction that the charge be now suitably amended.

K.C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

St. A. M. Palaniappa Chettiar .. *Appellant* in all appeals (8th Defendant)*

v.

Kuttayan Chettiar and others .. *Respondents.*

Palaniappa Chettiar *v.* Kuttayan Chettiar.

Transfer of Property Act (IV of 1882), S. 53—Avoidance of transfer—What has to be proved—Fraudulent preference—Whether can be avoided under S. 53—Transfer in satisfaction of genuine debts—Validity.

Under S. 53 of the Transfer of Property Act, in addition to consideration, good faith is an essential condition of the validity of the transfer. But it is not sufficient to show want of good faith on the part of the transferor alone; the knowledge and intention of the transferee are the determining factors.

A fraudulent preference can be attacked under the Bankruptcy Law but not under S. 53 of the Transfer of Property Act. What S. 53 prohibits is, not an instrument which prefers one creditor to another but an instrument which removes property from the creditors for the benefit of the debtor. So long therefore as a transfer is in satisfaction of genuine debts and without reservation of any benefit to the debtor, no ground for impeaching it arises.

Musabur Sahu v. *Hakim Lal,* (1915) 30 M.L.J. 116: L.R. 43 I.A. 104: I.L.R. 43 Cal. 521 (P.C.) and *Venkanna* v. *Official Receiver, East Godavari,* (1934) 68 M.L.J. 57, referred to.

Appeals against the decrees of the Court of the Subordinate Judge (Principal) of Madura in O. S. Nos. 87, 88, 89 and 91 of 1929, respectively.

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* Appeal No. 402 of 1931 and Appeals Nos. 44, 45 and 46 of 1932 (A. S. Nos. 63 of 1931, 64 of 1931 on the file of the District Court of Madura—transferred to the High Court by order of the High Court dated 15th December, 1931, in C. M. Ps. Nos. 4843 to 4845 of 1931).

26th August, 1937.

Palaniappa Chettiar v. Kuttayan Chettiar.

K. V. Sesha Aiyangar and *S. Kalyanasundara Mudaliar* for Appellant.

K. Rajah Aiyar, V. Ramaswami Aiyar and *V. Seshadri* for 1st Respondent.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—We have heard Mr. Sesha Aiyangar fully and do not propose to call on the respondents. The suits have been brought to enforce certain mortgages granted on behalf of a joint family by one Muthukaruppa and his son the first defendant, the adult members thereof. The eighth defendant is Muthukaruppan's son by another wife and there was a partition suit filed by him against the other members of the coparcenary about the year 1909. It is unnecessary to describe in detail the course of this litigation, for, it is sufficient to state that the Privy Council by the decree passed in June, 1921, awarded the eighth defendant a third share and the other members of the coparcenary the remaining two-thirds, and remitted the case to India for the passing of the final decree. There was a direction in the final decree that was ultimately passed in 1924, that the other members of the family were to pay the eighth defendant a considerable sum for mesne profits. The mortgages to which the present appeals relate, were executed in October, 1921, that is to say, soon after the preliminary decree made by the Judicial Committee and long before the final decree was passed. As already stated, the mortgagors became entitled to a two-thirds share in the family property under the judgment of the Privy Council and it is this two-thirds share that has been made the subject of the mortgages in question. The contest in the present appeals is between the plaintiffs, that is, those claiming from the mortgages on the one side and the eighth defendant on the other. The contest arises in this way. In execution of his decree for mesne profits, the eighth defendant had attached the mortgaged properties and on that account he has been impleaded as a party to the present actions. He now raises the plea that the mortgages were executed with intent to put the property out of his reach and that they are on that ground void as against him. The lower Court has found that there is no substance in this plea and that the transactions are *bona fide.*

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Very detailed and elaborate evidence has been adduced to show that consideration passed and it had been subjected to close scrutiny and we must hold that the eighth defendant has signally failed to make out his contention. Much of the evidence is documentary and has been fully adverted to in the lower Court's judgment. As we agree with its view that consideration passed, we do not propose to give our reasons in any detail.

Under S. 53 of the *Transfer of Property Act,* in addition to consideration, good faith is an essential condition of the validity of the transfer. But it is not sufficient to show want of good faith on the part of the transferor alone; the knowledge and intention of the transferee are the determining factors. This being so, granting that the mortgagors' intention to defraud has been proved, there is nothing in the evidence to justify the suggestion that the mortgagees were also parties to the fraud.

There is yet another matter which has been lost sight of. In the case of each of these mortgages, it was granted in satisfaction either wholly or substantially of a pre-existing debt. In other words, the transferees were not third parties but the mortgagors' creditors. A fraudulent preference can be attacked under the Bankruptcy Law but not under S. 53 of the Transfer of Property Act. This proposition has been very tersely stated in the judgment of Lord Wrenbury in *Musabur Sahu* v. *Hakim Lal*[1]. So long as the question does not arise under the law of bankruptcy, the transfer made in favour of one or more creditors cannot be impeached, for, what S. 53 prohibits is, not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors for the benefit of the debtor. So long therefore as a transfer is in satisfaction of genuine debts and without reservation of any benefit to the debtor, no ground for impeaching it arises. Lord Wrenbury quotes a passage (which we need not reproduce) from the judgment of Palles, C.B., in *Moroney,* In re[2], which states the principle on which this rule is based (see also *Venkanna* v. *Official Receiver, East Godavari*[3]). Although the lower Court has not viewed the present cases in

1. (1915) 30 M.L.J. 116: L.R. 43 I.A. 104: I.L.R. 43 Cal. 521 (P.C.).
2. (1888) 21 Ir. 27.
3. (1934) 68 M.L.J. 57.

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this aspect, its judgment can be supported even on this short ground.

Two minor matters now remain. The argument based on the doctrine of *lis pendens*, as the lower Court points out, has no application. Nor is there any substance in the contention, that a charge has been created over the properties in question for the mesne profits awarded.

In the result, the decrees of the lower Court are confirmed and all the four appeals are dismissed with costs. We make an order fixing the costs as follows: A consolidated sum of Rs. 525 (both for fees and out-fees) in Appeal No. 402 of 1931 and a similar sum of Rs. 110 in each of the three other appeals Nos. 44, 45 and 46 of 1932.

B. V. V. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

Buchayyagari Ranga Reddy .. *Petitioner* (1st Respondent)*

v.

The Official Receiver, Anantapur.. *Respondent (Petitioner).*

Ranga Reddy v. Official Receiver, Anantapur.

Provincial Insolvency Act (V of 1920), S. 54—Fraudulent preference—Insolvent, uncle and guardian of his nephew—Immovable properties alienated in favour of his nephew by insolvent—Circumstances—Relationship of the alienee—Motives behind the transaction—Tests of a fraudulent preference in the circumstances.

In an application for the setting aside of a sale of property on the ground of fraudulent preference under S. 54 of the Provincial Insolvency Act, the tests that should be applied, following Bowen, L.J., in *Hill,* Ex parte: *Bird,* In re, (1883) 23 Ch. D. 695 at 705, are (1) had the debtor a view of giving a preference to the creditor? and (2) was that the operative effectual view?

Where an insolvent (second respondent) was adjudicated on 30th November, 1931, and he had already executed a sale-deed in question on 27th July, 1931, in favour of his nephew and son-in-law the first respondent, and the Official Receiver applied to set aside the sale as fraudulent preference,

Held, that because the second respondent had been the guardian of the first respondent from 1922, and that for certain breach of trust he had to convey to his nephew on the eve of his insolvency his immovable properties by order of Court on his own admission of misappropriation of his ward's moneys, it was natural, if not inevitable, that the debtor had present to his mind, as one view among several, the giving of a preference to the particular creditor benefited, which could hardly be decisive of the matter. Hence the transfer could not be deemed a fraudulent preference.

Arunachalam Chettiar v. *Official Receiver of Tanjore,* (1925) 49 M.L.J. 562; *Ramaswami* v. *Chinnathambi,* A.I.R. 1932 Mad. 459 and *Gangappa* v. *Official Receiver of Bellary,* (1934) 41 L.W. 358, referred to.

* C. R. P. No. 1375 of 1935. 3rd September, 1937.

Ranga Reddy v. Official Receiver, Anantapur.

Petition under S. 75 (1) of the Provincial Insolvency Act, praying the High Court to revise the order of the District Court of Anantapur, dated 17th July, 1935, and made in C.M.A. No. 15 of 1934, preferred against the order of the Court of the Subordinate Judge of Anantapur, dated 14th December, 1933, in O.P. No. 22 of 1933 (O.P. No. 27 of 1932, District Court, Anantapur).

P. Chandra Reddi for Petitioner.

V. V. Chowdhary for Respondent.

The Court delivered the following

JUDGMENT.—The question to decide is whether the sale-deed impeached amounts to a fraudulent preference under S. 54 of the Provincial Insolvency Act. The material dates are these. The second respondent was adjudicated insolvent on 30th November, 1931, on a creditor's petition dated 8th August, 1931. The insolvent had executed the sale-deed in question on the 27th July, 1931, in favour of his nephew and son-in-law, the first respondent. On 9th July, 1932, the application, out of which this civil revision petition arises, was made by the Official Receiver for the setting aside of the sale-deed. The learned District Judge, reversing the decision of the trial Court, has held that the conveyance amounts to a fraudulent preference. The first respondent, the transferee, questions the correctness of the District Judge's order.

There is practically no dispute about the facts which may be shortly stated. In 1922, the second respondent was appointed guardian of the first under the Guardians and Wards Act. As the record shows, bonds of the value of about Rs. 7,200 belonging to the ward were taken possession of by the guardian. On 22nd February, 1931, the first respondent, who had by then attained majority, applied to the Court for directions against his quondam guardian, complaining that he had misappropriated the ward's funds and that proper accounts had not been rendered. The second respondent in his counter-affidavit, dated 6th July, admitted the breach of trust and, after putting forward various excuses, offered to convey his immovable property to get released from his obligation. The matter was apparently adjourned to enable the second respondent to carry out his promise and on 27th July, as already stated, the sale-deed in question came into existence. The sale

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purports to be for Rs. 6,000, the second respondent having been given credit for some amounts which he alleged to have expended on his ward's behalf. The application was finally disposed of on 8th August, when the Judge after recording the settlement dismissed the petition. On the same day, as already noted, the petition to adjudicate the second respondent insolvent was filed.

On these facts the question arises, does the conveyance amount to a fraudulent preference under S. 54 of the Provincial Insolvency Act? Both the Courts concur in finding that there was a true pre-existing debt as alleged by the transferee. They concurrently find further that the property conveyed was not worth more than Rs. 6,000, the consideration mentioned in the deed. That a petition imputing breach of trust to the second respondent was then pending, is common ground. Beyond these admitted facts, the first respondent swears that some ill-feeling had arisen between him and his former guardian a circumstance to which the District Judge does not advert. True, when he moved the Court, the first respondent was aware, as admitted by himself in his affidavit, that the second respondent was "on the brink of insolvency". These being the facts, is the Judge's decision right? The test in such cases is, what is the dominant or operative motive of the debtor in making the transfer. Is it a reasonable inference from the facts above mentioned, that the dominant view which influenced the second respondent was to prefer a particular creditor, or, is it more reasonable to hold that he acted with a view to protect himself from exposure or from any sort of proceedings? The first respondent was pressed to say in cross-examination:

"As I was his son-in-law, the second respondent wanted to pay me first."

The learned District Judge seizes upon this answer for the purpose of inferring that the transferor's object was to give the creditor a preference. He forgets that a debtor in giving a security to a particular creditor often acts from mixed motives. The very fact that S. 54 has been invoked, shows that while one creditor has been benefited, there are others who, as the result of the act impeached, have been defeated or defrauded. The question is not whether several motives have not operated on the mind of the creditor but what among them was the dominant or effectual motive. If the debtor is influenced solely by one motive, the case presents no difficulty whatsoever; but when the

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Court has to ascertain which of several motives is the operative or substantial motive, its task becomes difficult. In the present case, there is on the one hand the desire on the part of the debtor to protect himself; there may be on the other, in view of the admission referred to above, some desire to benefit his own near relative. In a case like the present, it is natural, if not inevitable, that the debtor has present to his mind, *as one view among several,* the giving of a preference to the particular creditor benefited; that could hardly be decisive of the matter. It would suffice to refer to the following cases where this question was considered by me in its different aspects: *Arunachalam Chettiar* v. *Official Receiver of Tanjore*[1], *Ramaswami* v. *Chinnathambi*[2], *Gangappa* v. *Official Receiver of Bellary*[3] and *Venkanna* v. *Official Receiver of East Godavari*[4]. In addition, it may be useful to quote here the words of Bowen, L.J.:

"It is an exceedingly difficult thing (it is possible no doubt, for juries may have to do it), to arrive at an opinion as to what is the dominant or operative motive of a man in doing a particular act. But if we are to consider whether amongst all the shadows which pass across a man's mind, some view as well as the dominant view influenced him to do the act, we shall be embarking on a dark and unknown voyage across an exceedingly misty sea. It is a very difficult matter to prove that the dominant motive was the sole motive, and I think that the true test under S. 92 is this: (1) had the debtor a view of giving a preference to the creditor? and (2) was that the operative effectual view?" (*Hill,* Ex parte: *Bird,* In re[5].)

Applying this test, I can have no hesitation in holding that the lower appellate Court's decision is wrong and it is accordingly set aside and the petition is allowed with costs throughout.

K. C. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE VENKATARAMANA RAO.

Rathnaswami Moopanar and others .. *Appellants* (Defendants)*

v.

R. C. Nagaraja Moopanar .. *Respondent (Plaintiff).*

Rathnaswami Moopanar v. Nagaraja Moopanar.

Transfer of Property Act (IV of 1882), S. 130—Lease of properties—Lease again of same properties and others subsequently—Arrears of rent

1. (1925) 49 M.L.J. 562.
2. A I.R. 1932 Mad. 459.
3. (1934) 41 L.W. 358.
4. (1934) 68 M.L.J. 57.
5. (1883) 23 Ch. D. 695 (C.A.).

*Appeal No. 505 of 1931. 3rd September, 1937.

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under prior lease claimed by lessee under the subsequent document—Assignment of reversion—No separate document necessary—Whether later lease valid in law.

There is always a distinction between an assignment of the rents and profits and a lease of a reversion. In the case of an assignment of rents and profits, all that the assignee will be entitled to, is the right to realise the rents and profits by virtue of the assignment in his favour, but in the case of a reversion it is not merely the right to recover the rents and profits that are transferred to him but also the right which the lessor had on the date of the reversion, for example, his right to recover possession immediately on the expiry of the previous term and if before the expiry of the term by virtue of any forfeiture, the lessor had the right to re-enter, the right of such re-entry.

A lease Ex. B was executed of certain lands in 1920 in favour of one *S* by the first defendant. It was to run from Fasli 1333 to 1342. Subsequent to the execution of this lease, on the 23rd September, 1925, the said *S* gave a lease Ex. A in favour of the plaintiff of the whole of the properties. The latter lease was for ten faslis from 1335 to 1344 and was to commence from Fasli 1335. The document comprised not only lands which were the subject-matter of the previous lease deed Ex. B but also other properties. It was also attested by the first defendant in whose favour was the previous lease. In and by the terms of that document plaintiff was to collect the lease paddy and cash rent due from all the lessees mentioned in the said document including the lease of 1920. A suit was instituted under Ex. B for recovery of arrears of rent for Faslis 1335 to 1339.

Held, that on a construction of the plaint document, the intention was clear that there should be a lease of the reversion; in fact all the rights and obligations which the lessor had at the date of the lease were intended to be leased to plaintiff and the lease was not a bare assignment of the rents and profits in which case probably such an assignment would be an assignment of actionable claim within the meaning of S. 130 of the Transfer of Property Act and therefore would require a transfer in writing signed by the transferor. But the later document Ex. A was not a bare assignment of the rents and profits, and it was not logical or possible in the case to treat the right to recover profits and rents apart from other rights and obligations which the lessor had on the date of the lease.

Manickam Pillai v. *Ratnawami Nadar,* (1917) 33 M.L.J. 684, relied on.

Under the English law it is open to a landlord to create concurrent leases, that is, he can execute one lease to-day for a term and to-morrow he can execute another lease for another term to run from the date on which he executed the latter lease. Such a lease has always been held to be valid and in law would operate as an assignment upon the existing term.

Vide *Palmer* v. *Thorpe,* (1653) Cro. Eliz. 152: 78 E.R. 410.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore dated the 5th day of October, 1931 and passed in O. S. No. 58 of 1930.

A. C. Sampath Aiyangar and *T. R. Srinivasa Aiyar* for Appellants.

B. C. Seshachala Aiyar for Respondent.

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Venkataramana Rao, J.

The judgment of the Court was delivered by

Venkataramana Rao, J.—This is an appeal from the decree of the Court of the Subordinate Judge of Tanjore awarding a sum of Rs. 12,942-8-3 in favour of the plaintiff. The suit was to recover arrears of rent on the basis of a lease, Ex. B, dated 25th December, 1920, executed by the first defendant in favour of one Seethalakshmi Ammal, the then proprietrix of Kapisthalam estate and the second and third defendants are the undivided father and brother of the first defendant. The said lease was to run for ten faslis commencing from Fasli 1333 to Fasli 1342. The lands comprised in the lease were about 59 acres 37 cents in the village of Sathyamangalam. Subsequent to the execution of this lease, on the 23rd September, 1925, the said Seethalakshmi Ammal gave a lease Ex. A in favour of the plaintiff of the whole of the Sathyamangalam village including the lands which had been leased under the prior lease of 1920. The latter lease was for ten faslis from Fasli 1335 to Fasli 1344 and was to commence from Fasli 1335. The document was executed by the plaintiff in favour of Seethalakshmi Ammal. Not only did it comprise the lands which were the subject-matter of the lease of 1920, it also included lands comprised under three other leases whose terms were outstanding. This lease deed was attested by the first defendant in whose name the lease of 1920 Ex. B had been executed. In and by the terms of the said document Ex. A the plaintiff was authorised to collect the lease paddy and cash rent due from all the lessees mentioned in the said document including the lease of 1920. This suit has been instituted for the recovery of arrears for Faslis 1335 to 1339 payable under Ex. B.

Two defences were urged by the defendants in answer to the plaintiff's claim. One was that the plaintiff had no right to sue for the recovery of the arrears of rent in the absence of any assignment executed by Seethalakshmi Ammal in his favour and the lease deed in favour of the plaintiff does not operate as such an assignment. The second defence was that on the date of the execution of the lease in favour of the plaintiff, Seethalakshmi Ammal was not in a sound state of mind; therefore the lease must be deemed to be void and no rights accrued to the plaintiff thereunder. In regard to the first point, the contention of Mr. T. R. Venkatarama Sastriar

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is that once a lease has been executed for a term and it is outstanding, there can be no lease of the reversion because such a lease would in law amount to a transfer of the rents and profits due and recoverable from the prior lessee and can only be done by an assignment executed by the lessor. It seems to us that this contention is not sound. Under S. 105 of the Transfer of Property Act (before the amendment) which governs this case, there can be a lease of immovable property by virtue of a registered document executed by the lessee in favour of the lessor—vide *Syed Ajam Sahib* v. *Ananthanarayana Aiyar*[1]. The subject-matter of the lease must be immovable property and the immovable property may be actual land or may be a reversion upon an existing term. There is nothing in the Act to preclude the lease of a reversion. Under the English law, it is open to a landlord to create concurrent leases, that is, he can execute a lease to-day for a term and to-morrow he can execute another lease for another term to run from the date on which he executed the latter lease. Such a lease has always been held to be valid and in law would operate as an assignment upon the existing term—vide *Palmer* v. *Thorpe*[2]. There is nothing to preclude the application of this principle to India and it has been adopted by the Indian High Courts—vide *Manickam Pillai* v. *Ratnaswamy Nadar*[3]. Therefore, the question is, 'would Ex. A be a valid lease according to the Transfer of Property Act ?' It is conceded that it is. If Ex. A had mentioned simply that a lease of the lands which were also the subject-matter of the prior lease is being granted that would in law without anything more operate as an assignment of the reversion and entitle the lessee under the latter lease to recover the rent due and payable under the former lease. On a construction of the plaint document, the intention is clear that there should be a lease of the reversion; in fact all the rights and obligations which the lessor had at the date of the lease were intended to be leased to plaintiff and the lease is not a bare assignment of the rents and profits in which case, probably, as Mr. T. R. Venkatarama Sastriar contends such an assignment would be an assignment of an actionable claim within the meaning of S. 130 of the Transfer of Property Act and therefore require a transfer in writing signed by the transferor.

1. (1910) 21 M.L.J. 202: I.L.R. 35 Mad. 95 (F.B.).
2. (1653) Cro. Eliz. 152: 78 E.R. 410.
3. (1917) 33 M.L.J. 684.

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But the present document Ex. A is not a bare assignment of the rents and profits and it is not logical or possible in this case to treat the right to recover profits and rents apart from other rights and obligations which the lessor had on the date of the lease. There is always a distinction between an assignment of the rents and profits and a lease of a reversion. In the case of an assignment of rents and profits, all that the assignee will be entitled to is the right to realise the rents and profits by virtue of the assignment in his favour but in the case of a reversion, it is not merely the right to recover the rents and profits that are transferred to him but also the rights which the lessor had on the date of the reversion, for example, his right to recover possession immediately on the expiry of the previous term and if before the expiry of the term by virtue of any forfeiture, the lessor had the right to re-enter, the right of such re-entry.

We are therefore clearly of the opinion that Ex. A is a lease of the reversion upon the existing term under Ex. B in regard to the suit property and the plaintiff is therefore entitled to realise the rents and profits for the faslis in question.

In regard to the second point, the only evidence that has been relied on is an alleged admission of the plaintiff in his deposition to the effect that he presented an application in 1926 to the Court of Wards requesting them to take possession of the Kapisthalam estate on the ground that Seethalakshmi Ammal, the proprietrix, was not in a sound state of mind and had been so for a period of two years before the date of the application but what he says in that deposition is that she was not in a sound state of mind now and then and not continuously. But in order to invalidate the suit document, it must be established that on the date of its execution in September 1925, Seethalakshmi Ammal was not in a sound state of mind and there is no evidence whatever on this point. Mr. Venkatarama Sastriar requests us to admit the application which the present plaintiff preferred to the Court of Wards as additional evidence in this case. The defendants had ample time to make that application to the lower Court and no explanation has been given for their delay in not doing so and we are not inclined to entertain this request at this state. No other point was argued before us.

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Therefore, on the evidence on record, the finding of the learned Subordinate Judge that Seethalakshmi Ammal was in a sound state of mind on the date of the lease in favour of the plaintiff must be affirmed.

In the result, the appeal fails and is dismissed with costs.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE KING.

Chinta Venkata Sundara Venugopalaswamy .. *Appellant* in Appeal and Petitioner in C. R. P. (Petitioner)*

v.

The President of the Board of Commissioners for the Hindu Religious Endowments, Madras .. *Respondent in both (Respondent).*

Venkata Sundara Venugopalaswamy v. President of the Board of Commissioners for the H.R.E., Madras.

Madras Hindu Religious Endowments Act (II of 1927), S. 84—Declaration by the Board of a temple to be public—Application to set aside the declaration on the ground that it was a private trust—Decision—Revision alone lies to High Court—Finding of fact must be clear—Dedication of property by itself not amounting to the trust being private or public.

Where the Board of Religious Endowments had held a temple in question to be a public one, then the decision on a petition to have that declaration set aside under S. 84 of the Madras Hindu Religious Endowments Act could not be appealed against, but only interfered with in revision by the High Court.

The lower Court in giving a finding on the facts as to the nature of the temple being public or otherwise ought to have come to a conclusion on the question whether originally also the temple was a private temple or not.

The question whether a dedication was to a public trust or not must be determined independently of the factum of the dedication of the property.

Appeal against and the petition under S. 115, Civil Procedure Code, and under S. 107 of the Government of India Act praying the High Court to revise the order of the District Court of Ganjam dated the 18th day of December, 1931, and passed in O. P. No. 7 of 1931.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Appellant in both.

Appeal No. 217 of 1932 and
*C. R. P. No. 1306 of 1932.

15th September, 1937.

Venkata Sundara Venugopalaswamy *v.* President of the Board of Commissioners for the H. R. E., Madras.

Varadachariar, J.

P. V. Rajamannar for Respondent in both.

The judgment of the Court was delivered by

Varadachariar, J.—This appeal and the connected Revision Petition arise out of an application made to the District Judge of Ganjam under S. 84 of the Madras Hindu Religious Endowments Act. The Board had held that the temple in question to be a public temple and the petition was filed to have that declaration set aside. As it has been held that this Court can deal with this matter only under S. 115, Civil Procedure Code, and that no appeal lies against the decision of the District Court on such applications, it is not open to us to review the learned judge's findings of fact. But we cannot help thinking that in the present case, the conclusion of the learned District Judge has been arrived at on the basis of some erroneous assumption of law and without sufficient realisation of the importance of coming to a definite conclusion as to whether at one time the temple was a private temple or not.

We do not wish to say anything which will hamper the lower Court in coming to its own conclusion on remand. We wish to point out that in view of the considerations adverted to in the learned Judge's order as supporting the petitioner's contention that, at the inception, the temple might have been a private temple, the petitioner is entitled to invoke the aid of the observations of the Judicial Committee in *Koman* v. *Achuthan Nair*[1] that if originally the temple was dedicated for the use of the founder's family and was a private trust, the fact of the admission of the public to the temple later on would not of itself necessarily affect the private character of the trust. It therefore seems proper that we should ask the learned District Judge to come to a definite conclusion on the question whether originally the temple was a private temple or not.

Again, the learned judge seems to think that the fact of properties being endowed in trust for this temple in 1900 itself amounts to a dedication to a 'public' purpose. This is not correct in law. The dedication of property will no doubt impress the property with the character of trust but it may as well be a private trust as a public trust. The question whether the dedication was a public trust or not must be determined

1. (1934) 67 M.L.J. 788: L.R. 61 I.A. 405: I.L.R. 58 Mad. 91 at 104 (P.C.).

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independently of the factum of the dedication of property. The circumstance that similar language was used in other dedications made about the same time to a temple which is admittedly public does not seem to us relevant because in the latter case, it is the admitted public character of the temple in favour of which the endowment was made that makes the endowment public, and it will be begging the question to assume that in the present case also the endowment so made must have been for a public purpose.

It is difficult for us to say how far the final conclusion of the learned judge has been influenced by errors and misconceptions on the above points. We therefore think it proper to set aside the learned judge's order and remand the case to the lower Court to be disposed of in the light of the above observations. The appeal will be dismissed and the remand will be made in the Revision Petition. There will be no order as to costs in the appeal and the costs in the Revision Petition will abide the result.

K. C. —— *Appeal dismissed and C. R. P. remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE NEWSAM.

M.M.S.T. Chidambaram Chettiar .. *Petitioner** (*Accused*)

v.

Shanmugam Pillai, Head Clerk of A.S. Manickam & Co., Tanjore.. *Respondent* (*Complainant*).

Chidambaram Chettiar *v.* Shanmugam Pillai.

Indian Penal Code (XLV of 1860), S. 415—Cheating alleged—Cheque dishonoured—Complaint after three months—Complaint not disclosing offence—Requisites of the offence of cheating, what are.

The petitioner was a motor bus owner and used to take on credit petrol from the firm of the complainant (respondent firm). By the beginning of 1937, the petitioner owed the firm over Rs. 3,000. On 23rd March, 1937, the petitioner gave the firm a post-dated cheque for Rs. 3,250 (2nd April, 1937). On 5th April, 1937, the firm presented the cheque at the Bank for encashment, but the cheque was dishonoured. Nothing further happened until more than three months later on 12th July, 1937, the clerk of the firm filed a criminal complaint for cheating against the petitioner setting out the above acts. The petitioner applied to the Magistrate not to proceed with the criminal complaint as no offence was disclosed, and since the complaint was filed to coerce him it should be dismissed.

* Cr. R. C. No. 623 of 1937.
Cr. R. P. No. 586 of 1937.

20th September, 1937.

Chidambaram Chettiar v. Shanmugam Pillai.

Held, that the proceedings should be quashed since no offence had been disclosed by the complaint as drafted but that it was filed *in terrorem*.

Mere deception is not a criminal offence. Mere dishonesty is not a criminal offence. The crux of the question in this case is whether the firm were induced by petitioner's dishonest deception not to file a suit at once against him. On the facts stated it is clear that they were not. To establish the offence of cheating the complainant in this case would have to show not only that he was induced not to file a suit for 13 days but that this induced omission on his part caused or was likely to cause him some harm or damage in body, mind, reputation or property which are presumed to be the four cardinal assets of humanity. The complaint does not even assert that such harm or damage was caused or likely to be caused and it is obvious from the circumstances that no such harm or damage was or could have been caused.

A post-dated chequein payment of goods already received is a mere promise to pay on a future date and a broken promise is not a criminal offence, though it may amount to discreditable behaviour.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate of Tanjore, dated 23rd August, 1937 in C.C. No. 447 of 1937.

K. S. Jayarama Aiyar and *C. K. Venkatanarasimham* for Petitioner.

M. Ranganatha Sastri for Respondent.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—This is a petition by a person accused of cheating praying this Court to quash the proceedings against him on the ground that the complaint discloses no offence.

The inherent jurisdiction of this Court to pass any orders necessary to prevent abuse of the process of any Court is not questioned and indeed has been clearly expressed in S. 561-A of the Criminal Procedure Code. Since prevention is always better than cure, the obligation to prevent specious and spiteful criminal prosecutions for actions which, though strictly dishonourable, yet do not amount to crimes is one that must never be shirked. In the world of business things are often done which are betrayals of confidence and deceptions which arouse moral indignation but are nevertheless civil wrongs which can be righted by Civil Courts and are not crimes which can be punished by a Criminal Court. Not every immoral act is criminal and it is an abuse of the process of a Court to attempt to create new crimes in order to compel men to conform to a high standard of probity in business dealings or to force them to execute their promises.

Chidambaram Chettiar *v.* Shanmugam Pillai.

The facts of this case are simple:—The petitioner was an owner of motor buses plying for hire from Tanjore to other places. He used to take petrol and oil on credit from the firm of A.S. Manickam & Co. By the beginning of 1937 he owed this firm over Rs. 3,000. The firm refused him further credit and threatened to sue him. On 23rd March, 1937, the petitioner gave the firm a post-dated cheque for Rs. 3,250 (dated 2nd April, 1937). He was not however afterwards allowed any further credit, and had to pay cash for everything. On 5th April, 1937, the firm presented the cheque at the Bank for encashment, but the cheque was dishonoured. Nothing further happened until more than three months later, namely, on 12th July, 1937, when a clerk of the firm filed a criminal complaint of cheating against the petitioner, setting out the above facts. The Sub-Divisional Magistrate, Tanjore, took this complaint on file under Ss. 415 and 417, Indian Penal Code and sent it to the Stationary Sub-Magistrate, Tanjore, for disposal, who ordered process to issue to the petitioner.

On 9th August, 1937, A.S. Manickam & Co. filed a suit against petitioner for the sum owed by him and applied for attachment before judgment of his motor buses.

The petitioner on 20th August, 1937, filed an application asking the Stationary Sub-Magistrate, Tanjore, not to proceed further with the criminal complaint since no offence was disclosed and since the complaint was filed to coerce, harass and humiliate him. This petition having been dismissed, the High Court has now been moved.

In my judgment the complaint in question does not on its face show that any criminal offence has been committed. In the offence of cheating (S. 415, Indian Penal Code) there are two elements—deception and dishonest inducement to do or omit to do something. Let it be assumed that petitioner deceived and was dishonest. Mere deception is not a criminal offence. Mere dishonesty is not a criminal offence. The crux of the question in this case is whether A.S. Manickam & Co. were induced by petitioner's dishonest deception not to file a suit at once against him. On the facts stated it is clear that they were not. The post-dated cheque was given on 23rd March, 1937 and dishonoured on 5th April, 1937 (an interval of 13 days). But no suit was filed until 9th August, 1937 (a further delay of 4 months). Moreover, to establish the offence

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incumbent upon the plaintiffs to allege and prove misconduct and for this he relies on the Risk-note. Under the Risk-note no doubt the Railway Company is freed from all responsibility for any loss of the consignment arising from any cause whatever except upon proof that such loss arose from the misconduct of the Railway administration's servants. But there is a proviso which has been introduced recently and which considerably modifies the obligations of the Railway Company. Under the proviso in the case of non-delivery of the whole consignment where such non-delivery is not due to accidents to trains or to fire, the Railway administration is bound to disclose to the consignor how the consignment was dealt with throughout the time it was in their possession or control and to give evidence in respect thereof and if misconduct on the part of the Railway administration cannot be inferred from such evidence then only the burden of proof is shifted to the consignor. A similar Risk-note Form B was the subject of interpretation before their Lordships of the Judicial Committee in a recent case (*Surat Cotton Spinning and Weaving Mills* v. *Secretary of State for India in Council*[1]). Their Lordships clearly lay down there that there is a distinct obligation on the part of the Railway Company to give full disclosure of how the goods have been dealt with by giving necessary evidence and explain what that necessary evidence should be. The evidence according to their Lordships must be all the evidence which the Railway administration considers desirable to avoid a fair inference of misconduct keeping in mind the provisions of S. 114 of the Evidence Act.

In view of this recent pronouncement it is clear that a Railway Company will be liable if they fail to account as to how the consignment was dealt with or from the evidence adduced in regard thereto an inference of misconduct can be presumed or if misconduct is proved. The loss by fire in this case has been relied upon by the Railway Company for two reasons: (1) to escape the obligation imposed upon them by the proviso, and (2) to show how the consignment was dealt with. Now the finding is that the Railway Company has failed to satisfactorily establish that the goods were lost by fire. From this it follows that they have failed to account as to how they

1. A.I.R. 1937 P.C. 152 (P.C.).

M. & S. M. Ry. Co., Ltd. v. Satyanarayana & Sons.

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dealt with the goods during the time they were in their possession and control and as observed by their Lordships in the said case if the administration fails to take the opportunity to satisfy the demands of the consignor to fulfil their obligation of disclosure so far as endorsed by the Court they will be in breach of their contractual obligation of disclosure. Therefore having failed to account for the loss of the goods and for the non-delivery thereof the Railway Company is liable. The decision of the lower Court awarding damages is therefore correct. Mr. Somasundaram objects to the award of interest from the date when the loss is alleged to have occurred. We think that the lower Court is not right in giving interest on damages from the date of the alleged loss. We therefore modify the decree of the lower Court by awarding interest at six per cent. on the amount of damages awarded from the date of the plaint. In other respects the decrees of the lower Court are confirmed and the appeals are dismissed with costs.

With regard to the memorandum of cross-objections in Appeal No. 347 of 1931 we think Mr. Lakshmanna is right in his contention in regard to the costs allowed to the second defendant and we allow the appeal in regard thereto as we think that the award of costs is not justified.

C. R. Ps. Nos. 463 to 471 of 1931.

Following our judgment in Appeals Nos. 347 and 348 of 1931, we dismiss these Revision Petitions with costs and fix the Advocate's fee at Rs. 10 in each except in C. R. Ps. Nos. 465 and 468 where we fix it at Rs. 20 in each.

K. C. *Appeals and Revision Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Y. Kothandarama Reddy and others.. *Petitioners** (*Accused*)

v.

Kandra Balarami Reddy .. *Respondent* (*Complainant*).

Kothandarama Reddy v. Balarami Reddy.

Indian Penal Code (XLV of 1860), S. 206—Accused harvesting standing crop which had been attached—Amin of Court protesting against action—

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* Crl. R. C. No. 862 of 1936.
(Crl. R. P. No. 781 of 1936). 17th March, 1937.

Venkatarama Sastri *v.* Venkatanarasimhan.

The Court delivered the following

JUDGMENT.—We are unable to support the order of the learned Subordinate Judge in this case. The final decree in O. S. No. 15 of 1926 expressly provides for sale of item 6 to discharge the debt due to the second defendant (appellant) under his prior mortgage. This is in pursuance of the provision in the preliminary decree declaring that he should be at liberty to apply for . . . . the sale of the mortgaged property (item 6). Whether that direction is right or wrong is not a question which can be discussed by a Court executing the decree. It is quite impossible to hold that the decree is merely declaratory of the rights of the second defendant.

As for the point of limitation it cannot be said that the appellant's application of 21st September, 1932, was not an application in accordance with law. There was no obligation on him, under O. 21, r. 11 of the Code of Civil Procedure, to produce a copy of the decree with the application. Under O. 21, r. 11 (3) of the Code of Civil Procedure the Court required him to produce a copy of the decree. He failed to do so and his application was accordingly rejected on 10th March, 1933. His application when made was perfectly 'in accordance with law' and the order of 10th March, 1933, was the final order on it. His present application dated 16th April, 1934, was therefore clearly in time.

The appeal is accordingly allowed. The execution application must be restored to file and disposed of according to law. The contesting respondent, the plaintiff, will pay the appellant's costs in both Courts.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice.*

Velagaleti Veerayya .. *Petitioner* (Defendant)*

v.

Kandeppu Narasimha Rao by mother and next friend Venkatasubbamma and another .. *Respondents (Plaintiffs).*

Veerayya *v.* Narasimha Rao.

Provincial Insolvency Act (V of 1920), S. 78 (2)—Suit on promissory note—Debt mentioned in schedule to insolvency petition—Period between adjudication and annulment—Whether to be excluded in computing period for limitation—Promissory note must be 'proved' and not merely 'provable.'

* C. R. P. No. 1509 of 1935. 20th January, 1937.

Veerayya v. Narasimha Rao.

Where the defendant filed a petition in insolvency on 5th March, 1930, but was adjudicated on 5th September, 1930, and subsequently the adjudication was annulled on 31st August, 1932, and the date of the promissory note in respect of which the present suit was filed had been executed on 4th November, 1928, on the question whether the debt mentioned had been proved under the Act so as to attract the operation of S. 78 (2),

Held, that by the mere inclusion of the promissory note in the schedule to the insolvency petition, the debt was not proved under the Act. Such a debt as that was at the most 'provable' in insolvency and not a debt 'proved'. *Lakshmi Bai* v. *Rukmaji Rao*, (1934) 67 M.L.J. 45: I.L.R. 57 Mad. 767, followed. Hence the suit on the promissory note was barred by limitation.

S. 78 (2) of the Provincial Insolvency Act only applies to debts 'proved' under the Act and not to debts 'provable'.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree dated 18th April, 1935, of the Court of the Subordinate Judge of Tenali in S. C. S. No. 92 of 1934.

G. Lakshmanna and *G. Chandrasekara Sastri* for Petitioner.

V. Viswanatha Sastri for Respondents.

The Court delivered the following

JUDGMENT.—S. 78 (2) of the Provincial Insolvency Act only applies to debts "proved" under the Act and not to debts "provable".

The facts of the case here as I understand them are that the defendant filed an insolvency petition on 5th March, 1930, and was adjudicated on 5th September, 1930. Subsequently the adjudication was annulled on 31st August, 1932. The date of the promissory note is 4th November, 1928. Therefore, unless S. 78 (2) can be relied upon by the creditor, the claim in the suit was barred by limitation. The facts appear to be that all that was done with regard to the suit debt was that it was included by the insolvent in his schedule and nothing more. The learned Subordinate Judge holds that the debt was thereby 'proved' relying on the Calcutta decision and overlooking the decision in *Lakshmi Bai* v. *Rukmaji Rao*[1]. He also adds in further support of his view that he cannot imagine any better proof of the debt than its admission, by the insolvent by his including it in his schedule of debts. That no doubt is some evidence of the existence of the debt but nevertheless the question still remains as to whether or not the debt has been 'proved' under the Act. In my view the debt is not proved under the Act by its mere inclusion in the schedule

1, (1934) 67 M.L.J. 45: I.L.R. 57 Mad. 767.

Veerayya v. Narasimha Rao.

of the insolvent. The matter has been fully dealt with in my own judgment in *Lakshmi Bai* v. *Rukmaji Rao*[1] and it is quite clear from it that such a debt as this is at the most a debt "provable" in the insolvency and not a debt 'proved'. The lower Court was, therefore, wrong in its conclusion and the decree of the lower Court is therefore reversed and the suit dismissed as being barred by limitation. The Civil Revision Petition is allowed with costs here and in the lower Court.

K. C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE NEWSAM.

A. T. Lakshmi Ambalam .. *Petitioner* (Counter-Petitioner)*

v.

Andiammal .. *Respondent (Respondent).*

Lakshmi Ambalam v. Andiammal.

Criminal Procedure Code (V of 1898), S. 488—Maintenance claim by a woman—No finding as to a valid marriage between the parties—Magistrate's order to award maintenance without a definite finding, wrong—'Living in adultery' meaning of.

Without a definite finding whether there was a valid marriage between the parties, a magistrate is not right in awarding maintenance to a woman on the basis that she had lived with the man for twelve years and also borne him a child. That is not the law. Only legally married women are entitled to maintenance.

Again on the contention raised that the woman was 'living in adultery' and hence forfeited her right to maintenance, *held*, that no man ought to desert and reject his wife and thus tempt her to an unchaste life and then resist her claim to be maintained by him on the ground of her unchastity.

Ma Mya Khin v. *N. L. Godenho*, A.I.R. 1936 Rang. 446, relied on.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Devakottai dated 30th November, 1936, and made in M.C. No. 16 of 1936.

K. S. Jayarama Aiyar and *R. Ramasubbier* for Petitioner.

S. Ramachandra Aiyar for Respondent.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—This is a petition praying that an order of the Sub-Divisional Magistrate, Devakottai, awarding Rs. 15 as

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1. (1934) 67 M.L.J. 45: I.L.R. 57 Mad. 767.

* Cr. R. C. No. 65 of 1937. 6th October, 1937.
(Cr. R. P. No. 61 of 1937).

Lakshmi Ambalam *v.* Andiammal.

maintenance to a woman and Rs. 5 as maintenance to her daughter, be revised.

The petitioner resisted the respondent's claim for maintenance on two important grounds. The chief ground was that the woman seeking to be maintained was not his lawful wife. The pleadings are not exactly explicit on the point but their meaning is quite clear. Thus, petitioner said in his statement "She was taken as wife by me 12 years ago, though there was no actual marriage". There was a great deal of evidence on both sides on this question, but the Magistrate declined to give a definite finding. He seems to have been under the impression that a woman is entitled to maintenance if she has lived with a man as his wife for 12 years and has also borne him a child. That, however, is certainly not the law. Only legally married woman are entitled to maintenance. I must therefore send this case back to the lower Court for a definite finding after hearing both sides on the evidence already on record on the question whether there was a valid marriage between the parties. I may perhaps add that this Court will be very loath to interfere with such a finding of fact, for the party aggrieved by the finding may always file a suit. But this Court must interfere if a Magistrate awards maintenance to a woman and does not justify his action by a definite finding that she is the wife of the person ordered to pay her maintenance. For only wives are entitled to maintenance. The petitioner also pleaded that even if it be found that the woman is his wife she is not entitled to maintenance because she is "living in adultery". The only evidence of that offered was that she was expecting a baby which could not be his and had more than one lover. Now, I understand the phrase "living in adultery" to mean something quite different from living an unchaste life. The principle, it seems to me, is that a husband is absolved from the obligation to maintain his wife when his wife has a *de facto* protector with whom she lives and by whom she is being maintained as if she were his wife. The obligation of a husband to maintain his wife arises from the anxiety of the legislature to protect deserted wives from the bitter necessity of earning a living by trading on their sex. That obligation however ceases when it has been voluntarily assumed by some man other than the woman's husband. No woman can fairly claim a right to be kept by two men. But it obviously is not the law

Lakshmi Ambalam v. Andiammal.

that a man may desert and neglect his wife and thus tempt her to unchastity and then resist her claim to be maintained by him on the ground that she is unchaste. This view of the meaning of the words "living in adultery" receives support from *Ma Mya Khin* v. *N. L. Godehno*[1].

The lower Court's order is set aside and the case remitted for disposal afresh on the evidence already on record in the light of the above remarks, that is, after recording a finding on the validity of the marriage.

K. C. *Order set aside and case remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

V. E. N. K. R. M. A. Ramanathan Chettiar Hukdar of Nagappa Chettiar Kattalai in the Sri Meenakshi Sundareswarar Devasthanam, Madura .. *Appellant**

v.

The Madura Sri Meenakshi Sundareswarar Devasthanam by its trustee, R. Duraiswami Naidu .. *Respondent.*

Ramanathan Chettiar v. Madura Sri Meenakshi Sundareswarar Devasthanam.

Decree for settling a scheme—Court whether liable to be called upon to work it in execution.

The trend of the decisions has been towards the view that once a decree settling a scheme has been passed the Court has done its duty and is not to be called upon in the execution department to make the scheme work, vide *Vaithilinga Mudaliar* v. *Board of Control, Sri Thyagarajaswami Devasthanam, Tiruvarur*, (1936) 71 M.L.J. 87: I.L.R. 59 Mad. 751.

Appeal against the order of the Court of the Subordinate Judge of Ramnad at Madura dated 8th August, 1934, and made in E. A. No. 260 of 1933 and Auditor's report of Nagappa Chettiar's Kattalai in Madura, etc., Devasthanam for Faslis 1335 to 1340 in O. S. No. 36 of 1915 on the file of the Court of the Additional Subordinate Judge of Ramnad at Madura.

M. Patanjali Sastri for Appellant.

K. Rajah Aiyar for Respondent.

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1. A. I. R. 1936 Rang. 446.

* A. A. O. No. 14 of 1935. 27th August, 1937.

Ramanathan Chettiar *v.* Madura Sri Meenakshi Sundareswarar Devasthanam.

The Court delivered the following

JUDGMENT.—In our opinion the learned Subordinate Judge took the correct view both as to the general principle and as to the particular case. There may have been some divergence of view in this Court in the past, as Mr. Patanjali Sastri contends, but latterly the trend of the decisions has undoubtedly been towards the view that once a decree settling a scheme has been passed the Court has done its duty and is not to be called upon in the execution department to make the scheme work (vide *Vaithilinga Mudaliar* v. *Board of Control, Sri Thyagarajaswami Devasthanam, Tiruvarur*[1]). With due respect to the learned Judges who have taken the other view, we think this is correct, and see no sufficient reason to accept Mr. M. Patanjali Sastri's suggestion that the case should be laid before a Full Bench.

In this case before us, we agree with the learned Subordinate Judge that the decree itself does not even purport to be executable. It provides in paragraph 4 that the Manager shall deposit the Kattalai funds (over Rs. 1,000) in a Bank, but it makes no provision for the decision of any dispute between the Manager and the hukdar as to the amount due to be deposited.

In paragraph 9 it is ordered that there shall be an annual audit but no provision is made for scrutiny of the auditor's report by the Court or for enforcing any conclusions arrived at by the auditor or the Court.

As the learned Subordinate Judge observes there is nothing of an executable character in either paragraph 4 or paragraph 9 of the decree.

This appeal is accordingly dismissed with costs.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Murugesa Mudali ... *Petitioner* (1st Respondent-1st Defendant)*

v.

Angamuthu Mudali ... *Respondent (Petitioner-Plaintiff).*

Murugesa Mudali *v.* Angamuthu Mudali.

Civil Procedure Code (V of 1908), S. 151 and O. 39, rr. 1 and 2—Disobedience to order of injunction when—Court's order merely mentioning 'interim

1. (1936) 71 M.L.J. 87: I.L.R. 59 Mad. 751.

* C. R. P. No. 1373 of 1935. 8th October, 1937.

Murugesa Mudali *v.* Angamuthu Mudali.

stay'—Petitioner taking delivery of land after notice of such order served on him—Whether there was disobedience of injunction punishable—Whether S. 151 of the Code could be invoked in the circumstances of the case.

The petitioner obtained a decree against *K* in O.S. No. 982 of 1928 for vacant possession of a piece of land on which part of a building stood. When the decree-holder went to take possession he was resisted by the respondent herein and a Civil Miscellaneous Petition was filed to remove the obstruction so caused. An order for removal of obstruction was passed on 10th October, 1932 and when the *Amin* went to carry out the order the respondent against whom order had been passed instituted a suit apparently under O. 21, r. 103 against petitioner herein and he filed a Civil Miscellaneous Petition for an order restraining the petitioner herein by temporary injunction from executing the decree in O.S. No. 982 of 1928 and thereby demolishing the building. The petition was under O. 39, rr. 1 and 2 of Civil Procedure Code and S. 151 of the Code. The District Munsif ordered 'notice and interim stay' after 2 P.M. On the contention that there had been disobedience of the injunction said to have been passed in the Civil Miscellaneous Petition filed by the respondent herein when the petitioner gave receipt of delivery of the property,

Held, that the taking of the delivery implied in the passing of the delivery of receipt was not punishable as an act of disobedience of the injunction.

O. 39, r. 1, Civil Procedure Code, contemplates an injunction being granted only to prevent any property being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree. This would not include the new act of taking possession in execution of decree. When the Court's order merely stated 'interim stay' and the notice actually served on the petitioner did not make matters clear, there would be no justification for holding that the taking of delivery in those circumstances would amount to a disobedience of an injunction punishable under O. 39.

Whatever may be said as to the power of the High Court to issue injunction for other purposes and to punish disobedience thereof in exercise of its own inherent power as a Court of record, the power of Subordinate Courts must be found within the four corners of the Code and it would be too much to suggest that, when the Code has expressly dealt with injunction in O. 39, S. 151 can be invoked to add to the powers thus conferred.

Petition under Ss. 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the District Court of North Arcot at Vellore, dated 26th September, 1935 and passed in C.M.A. No. 11 of 1935 (I.A. No. 1666 of 1932 in O.S. No. 414 of 1932 on the file of the Court of the District Munsiff of Ranipet).

V. T. Rangaswami Aiyangar for Petitioner.

A. C. Sampath Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition arises out of an application to punish the petitioner for disobedience of an injunction issued by the District Munsiff's Court at Ranipet. It will

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be convenient to describe the parties with reference to their array here.

The petitioner had obtained a decree against one Kadirvelu Mudali, in O.S. No. 982 of 1928, for vacant possession of a piece of land on which part of a building stood. When the decree-holder went to take possession, he was resisted by the present respondent and M.P. No. 618 of 1932 was accordingly filed for removal of obstruction. An order for removal of obstruction was passed on 10th October, 1932 and it is agreed that early on the 11th of October the Amin, to whom the warrant to carry out that order had been entrusted, went to the locality which is about two miles from the Court premises to carry out that order. The evidence also shows that the petitioner was present during the time that the Amin was carrying out that order. On the 11th itself the respondent, against whom the order on M.P. No. 618 of 1932 had been passed, instituted O.S. No. 414 of 1932 apparently under O. 21, r. 103 and on the same day he filed M.P. No. 1666 of 1932 for an order restraining the defendant by a temporary injunction from executing the decree in O.S. No. 982 of 1928 and thereby demolishing the building and taking possession of the same until disposal of the suit. The petition purported to be under rr. 1 and 2 presumably of O. 39, Civil Procedure Code and S. 151. This came on for orders some time after 2 P.M. on the 11th and the District Munsiff passed an order "notice and interim stay".

The trouble in this case arises from the informal terms of the order on the injunction petition. A reference to Appendix F, Form No. 8 of the Civil Procedure Code will show how temporary injunctions are expected to be framed. The order actually served on the petitioner does not correspond to the terms of Form No. 8. It stated that an order of interim stay had been passed in respect of the execution of the decree in O.S. No. 982 of 1928 and proceeded to add that the petitioner was accordingly bound not to do so. It is common ground that even before 2 P.M. on the 11th some portions of the building on the site in question had been demolished and it is also admitted by the petitioner that at about 6 P.M. that evening he took formal delivery in terms of the receipt filed in this case. There was some question raised as to when the order of injunction was served on the petitioner, but I see no

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reason for not accepting the finding of the District Court that it must have been served upon him between 3 and 3-30 P.M. The learned District Judge himself finds that after service of this notice the petitioner must have gone to his vakil at Ranipet and taken his advice as to the further course to be followed. It also appears from the evidence that even during the petitioner's absence, as the petitioner's vakil in the main case was present when the temporary injunction petition came on for orders before the District Munsiff at 2 P.M., the District Munsiff orally informed the petitioner's vakil of the order that he was passing. It may therefore be presumed, as stated by the District Munsiff, that when the petitioner went to consult his vakil, the vakil would have advised him not to disobey the injunction. I do not therefore see sufficient reason to think that any demolition was likely to have taken place after the service of the order upon the petitioner.

The District Munsiff however thought that the passing of the receipt of delivery and the act of taking delivery therein implied amounts to a "technical" breach of the injunction and curiously he added that. it was significant that the petitioner went to the scene even on the next day, as though that will amount to a breach of the injunction. As in his view, the disobedience was only technical, he directed that the petitioner should be imprisoned for a week. The learned Judge on appeal disagreed with the view that the disobedience was only technical, but I cannot help thinking that the learned Judge has been carried away by his opinion that even apart from the injunction the act of demolition was high-handed and unauthorised from beginning to end, because he thought that the order passed on M.P. No. 618 of 1932 did not warrant it. It is unnecessary for me to canvass the correctness of this conclusion, because that is not a matter that arises for consideration in this proceeding. We have only got to see whether there has been any disobedience of the injunction said to have been passed in M.P. No. 1666 of 1932.

I am unable to agree with the view that the taking of delivery implied in the passing of the delivery of receipt is punishable as an act of disobedience of the injunction. O. 39, r. 1, Civil Procedure Code, contemplates an injunction being granted only to prevent any property being wasted, damaged or alienated by any party to the suit or wrongfully sold in exe-

cution of a decree. This certainly would not include the mere act of taking possession in execution of a decree. I am aware it has been sometimes held that O.39, rr. 1 and 2 are not exhaustive of the Court's power to grant a temporary injunction—see *Vidyapurna Thirthaswamy* v. *The Vicar of Suratkal Church*[1], *Adaikkala Thevan* v. *Imperial Bank, Madura Branch*[2] and *Kanshi Ram* v. *Sharaf Din*[3]. A different view was taken in *Nasarvanji* v. *Shahajadi Begam*[4] and I must add that the cases which held that O. 39 is not exhaustive do not seem to have given due weight to the words "if it is so prescribed' recurring in the opening paragraph of S. 94 of the Code. "Prescribed" in that section undoubted means 'prescribed by the rules'. Whatever may be said as to the power of the High Court to issue injunction for other purposes and to punish disobedience thereof in exercise of its own inherent power as a Court of record, the power of Subordinate Courts must be found within the four corners of the Code and it seems to me too much to suggest that, when the Code has expressly dealt with injunctions in O. 39, S. 151 can be invoked to add to the powers thus conferred. I do not however discuss this question further because, even assuming for the sake of argument that the Court has such power, I have still got to see what the order in this case was and whether there was any reason for the petitioner to assume that the Court granted an injunction wider in scope than O. 39, r. 1 contemplates.

As I have stated already, the Court's order merely stated "interim stay" and the notice actually served on the petitioner did not make matters clearer. Whether a delivery taken after an order of that kind will not be void in law is another matter; but I see no justification for holding that the taking of delivery in those circumstances will amount to a disobedience of an injunction punishable under O. 39. If I were satisfied that even after 3-30 P.M. on the 11th October, the petitioner was a party to any further demolition, I should not have hesitated to deal with him as he deserved. But though the respondent alleged and sought to prove that the demolition continued up to 10 P.M. that night and even for a part of the next day, neither Court has accepted that version, and both the Courts have

1. (1917) 7 L.W. 328.
2. (1925) 50 M.L.J. 401.
3. (1922) 73 I.C. 909.
4. (1922) I.L.R. 46 Bom. 939.

based the order against the petitioner only on the ground that he took delivery after service of the injunction order. I am unable to hold that this conduct of the petitioner will amount to a breach of the injunction. On this ground, I set aside the order of the Courts below, but as the petitioner has undoubtedly acted in haste and has been in some degree responsible for bringing about this situation, I make no order as to the costs of this Civil Revision Petition.

Murugesa Mudali *v.* Angamuthu Mudali.

K. C. —— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Sri Venkataramanaswami Temple at Kanampalli by its present trustee, Kunchi Padmanabha Aiyar .. *Appellant** (*Plaintiff*)

v.

Ramaswami and others .. *Respondents* (*Defendants*).

Sri Venkataramanaswami Temple at Kanampalli *v.* Ramaswami.

Archaka—Hundi collections—Cash claimed by Archaka as belonging to him—Origin of practice not known—Evidence available speaking to the practice—Presumption in favour of the practice as not opposed to public policy.

Where the question was whether the practice that the Archaka of a temple should take the whole of the Hundi collections for his own maintenance expenses and for the expenses of the pooja was an illegal practice opposed to public policy,

Held, that though nothing was known of the origin of the practice and no evidence existed of any agreement entered into between the trustees and the Archakas permitting the Archakas to appropriate the moneys, since as all that was known was that the practice had been in existence as long as witnesses could remember and no instance had been given of any occasion on which the Archakas had not appropriated the money, it could be said, that the presumption of a legal origin to the practice was neither unreasonable nor against probabilities arising from the evidence.

Sri Mahant v. *Govindacharlu*, (1934) 68 M.L.J. 295, followed and *Venkataramana Aiyangar* v. *Kasturiranga Aiyangar*, (1916) 31 M.L.J. 777: I.L.R. 40 Mad. 212 (F.B.), referred to.

Appeal against the decree of the Court of the Subordinate Judge of Salem in Appeal Suit No. 141 of 1934 preferred against the decree of the Court of the District Munsiff of Krishnagiri in Original Suit No. 265 of 1932.

B. Somayya for Appellant.

C. S. Venkatachariar and *D. Ramaswamy Aiyangar* for Respondents.

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*S. A. No. 35 of 1936. 6th September, 1937.

Sri Venkataramanaswami Temple at Kanampalli v. Ramaswami.

The Court delivered the following

JUDGMENT.—The question argued in this appeal is whether the practice that the Archaka should take the whole of the Hundi collections for his own maintenance expenses and for the expenses of the Pooja is an illegal practice opposed to public policy. The first Court, on the authority of *Venkataramana Aiyangar* v. *Kasturiranga Aiyangar*[1], thought it was; but the appellate Court has thought that the more recent case *Sri Mahant* v. *Govindacharlu*[2] shows that appropriation by Archakas of a fixed portion of the Hundi collections is not necessarily an illegal practice.

Mr. Somayya has taken me through *Venkataramana Aiyangar* v. *Kasturiranga Aiyangar*[1] at some length to try to satisfy me that the facts of that case fully resemble those in the present case; but it would appear that in *Venkataramana Aiyangar* v. *Kasturiranga Aiyangar*[1] the Archakas at no time claimed a right to appropriate the Hundi collections except on the ground that such an appropriation was necessary for the maintenance and proper performance of the ceremonies connected with the temple. It also appears in that case that the Government, apparently then representing the temple, interfered from time to time with the appropriation of the collections by the Archakas and only allowed them to enjoy it because they were satisfied that it was necessary in the interests of the proper performance of the ceremonies of the temple. The agreement which subsequently came up for consideration in that case was one entered into between the trustee and the Archakas whereby the Archakas were to appropriate the collections and give to the temple the sum of Rs. 300. It was held that the trustee had no authority to make a permanent arrangement of this kind and that it was a breach of trust to do so. In *Sri Mahant* v. *Govindacharlu*[2] there was also a practice whereby the Archakas appropriated a fraction of the Hundi collections, and out of that sum they had to maintain themselves and perform certain poojas and other ceremonies. Varadachariar, J., held that such a practice was not repugnant to Hindu ideas and that when the origin of the practice was unknown, it must be assumed to be a legal one. The presumption of a legal origin is a rule of convenience; for if there were no

1. (1916) 31 M.L.J. 777: I.L.R. 40 Mad. 212 (F.B.).
2. (1934) 68 M.L.J. 295.

Sri Venkata-ramana-swami Temple at Kanampalli v. Ramaswami.

such presumption, it would be impossible in many cases to decide what the rights of parties were. Their Lordships of the Privy Council, in considering this matter in *Magniram Sitaram* v. *Kasturbhai Manibhai*[1] and *Mahammad Mazaffar-al-Musavi* v. *Jabeda Khatun*[2] recognised the propriety of applying this rule, provided that the presumption of legal origin was practicable and reasonably capable of being presumed without doing violence to the probabilities of the case. In the case before us, nothing is known of the origin of this practice, and no evidence exists of any agreement entered into between the trustees and the Archakas permitting the Archakas to appropriate this money. All that we know is that the practice has been in existence as long as witnesses can remember and no instance has been given of any occasion on which the Archakas have not appropriated this money. It cannot be said that the presumption of a legal origin to the practice is unreasonable and against the probabilities arising from the evidence. The lower Court was therefore justified in presuming a legal origin.

It may be mentioned, although the matter is not of any great importance, that the Archaka does not claim every thing that is put in the Hundi; but only the cash. Certain saffron coloured pieces of cloth with coins tied in them, etc. and gold and silver articles are also placed in the Hundi; and the Archaka does not deny that this property belongs to the temple.

There is only one exhibit in the case that has any bearing on the case, and that is Ex. K. It bears the date 10th December, 1909 and purports to be a patti signed by one Balaji Rao, presumably the manager of the temple for that year, setting out the expenses incurred for the payment of servants for the necessary services of the temple. In accordance with that patti the Government made a grant of Rs. 81-11-2; but it does not appear that it was expected that the money should be spent in precisely the manner set out in Ex. K. Ex. K purports to be rather an estimate of the expenses that had been met by the State before the British Government assumed power, or, at any rate, the expenses of the temple which the present Government felt it their duty to

1. (1921) 42 M.L.J. 501: L.R. 49 I.A. 54: I.L.R. 46 Bom. 481 (P.C.).
2. (1930) 58 M.L.J. 641: L.R. 57 I.A. 125: I.L.R. 57 Cal. 1293 (P.C.).

Sri Venkata-ramana-swami Temple at Kanampalli *v.* Ramaswami.

meet. Ex. K shows that the maintenance of the Archakas was estimated at Rs. 17-12-5, and certain other sums were allowed for the performance of the daily pooja and so on. Presumably, the claim of the Archakas is that they should be entitled to whatever sum is placed in the hundi, subject to the minimum of this sum granted by the Government in accordance with this patti. I do not think there is anything in this patti which would limit the right of the Archakas to Rs. 17-12-5 remuneration; and in fact Mr. Somayya has fairly conceded that if the Archaka is not entitled to the Hundi collections further relief would have to be granted to him.

I therefore agree with the lower appellate Court and dismiss this appeal with costs.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

K. Venkatesa Sastrigal, Manager of a joint Hindu family consisting of himself, and younger brothers and others .. *Appellants* (Legal representatives of the 2nd defendant, 3rd defendant, 4th defendant, 7th defendant and nil nil)*

v.

Krishna Aiyar .. *Respondent (Plaintiff).*

Venkatesa Sastrigal *v.* Krishna Aiyar.

Costs—Mortgage suit—Mortgagor filing written statement but remaining ex parte—*Puisne mortgagees, other defendants, in the suit—Support by them of the first defendant's written statement—Liability in costs.*

In a mortgage suit where the mortgagor who was the first defendant remained *ex parte* but the puisne mortgagees supported the first defendant's written statement denying his liability, on the question of costs,

Held, that when the second defendant had so completely identified himself with the first defendant and had opposed the grant of the decree by taking a leading part even when the first defendant had been *ex parte*, it would be difficult to hold that the trial Court was not justified in declaring that the defendants who had opposed the suit should be as fully liable for costs as the first defendant (mortgagor) himself.

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* Appeal No. 142 of 1932. 10th September, 1937.

Venkatesa Sastrigal v. Krishna Aiyar.

Venugopalachariar v. *Padmanabha Row*, (1915) 29 M.L.J. 120, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in O. S. No. 26 of 1931.

K. Balasubramania Aiyar for *Watrap S. Subramania Aiyar* for Appellants.

P. S. Narayanaswami Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—In this mortgage suit the first defendant was the mortgagor; the second and third defendants were puisne mortgagees; the fourth defendant was the purchaser of the equity of redemption of the greater number of the items mortgaged; and the seventh defendant was the purchaser of one item. The first defendant filed a written statement denying his liability and then remained *ex parte*. The other defendants mentioned above supported the written statement of the first defendant. The third defendant made a special claim to priority and the seventh defendant raised a number of pleas in connection with the item of property that he had purchased. In the decree in the suit the lower Court made defendants 1, 2, 3, 4 and 7 all personally liable for costs on the ground that defendants 2 to 4 and 7 supported the first defendant in resisting the plaintiff's claim. Defendants 2 to 4 and 7 appeal against the decree for costs.

It has been argued that in a mortgage suit no person but the mortgagor can be made personally liable for costs. If that contention were correct it would lead to very anomalous results, as the mortgagor might admit the plaintiff's claim and all the resistance come from the other parties to the suit, who would not if this argument were correct be liable for costs at all. *Venugopalachariar* v. *Padmanabha Row*[1] has been quoted as an authority for this peculiar position. That was also a mortgage suit; but the decree contained a declaration of the personal liability of the second defendant (who was not the mortgagor) for the plaintiffs' costs in case the sale proceeds were not sufficient to pay them as well as the mortgage money. The argument was there accepted that O. 34, r. 6, Civil Procedure Code, which relates to the recovery of any balance due on a mortgage after the sale, does not make any provision for

1. (1915) 29 M.L.J. 120.

Venkatesa Sastrigal *v.* Krishna Aiyar.

recovery from any person personally other than the mortgagor because the word defendant in r. 6 means only the mortgagor. It was a purely technical argument and it turned on the interpretation of r. 6. In the present case however there is no need for recourse to r. 6 and no reason has been given why the Court in the exercise of its usual discretion with regard to costs cannot make any person who is a party to the suit liable for a part or the whole of the costs.

Although it appears from the record that it was the second defendant's counsel who was responsible for most of the cross-examination of the plaintiff's witnesses and for leading the evidence against the plaintiff, yet it is difficult to distinguish between the responsibilities of the second defendant and the other appellants. It often happens that a particular defendant's counsel cross-examines the witnesses; and if his cross-examination is sufficient there is no necessity for further cross-examination by the counsel for the other defendants. Similarly, one defendant, upon whose peculiar knowledge of the facts the defendants rely, may lead evidence; but if it appears that the other defendants are supporting the defendant who is doing the spade work on behalf of all of them, there is no reason or equity why those other defendants should not be as fully liable for costs as the defendant whose counsel is responsible for most of the cross-examination and for the leading of the evidence on behalf of the defendants. I therefore find myself unable to agree that some distinction should have been made by the lower Court between the case of the second defendant and those of the remaining appellants.

It is further argued that in any event the appellants ought not to have been saddled with the costs of the institution of the suit—the argument being that in any event it was necessary to institute a suit and to pay the necessary costs of institution, namely, court-fee, vakalat-fee, and so on, and that the fact that the appellants intervened and opposed the granting of the decree would at the most only make them liable for such costs as might have been incurred after the institution of the suit. There is no doubt some force in this argument; but when another defendant so completely identifies himself with the mortgagor and, as in this case, goes to the extent of opposing the grant of the decree even when the mortgagor was *ex parte*, it is difficult to hold that the trial Court is not justified in

declaring that those defendants who opposed the suit should be as fully liable for costs as the mortgagor himself. I do not therefore feel justified in interfering with the discretion of the trial Court in the matter of costs.

Venkatesa Sastrigal *v.* Krishna Aiyar.

The result is that this appeal is dismissed with costs.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Original Testamentary Jurisdiction.]

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

In the matter of *The Estate of C. Govindaswamy (Deceased)*.*

In the matter of The Estate of C. Govindaswamy.

Court-fees—Probate duty—Application made in forma pauperis—*Power of Court to award relief—Probate duty payable as first charge on estate—Madras High Court Original Side Rules, O. 8, r. 14—Applicability to proceedings for probate—Court-Fees Act (VII of 1870), S. 19-I—Effect—Civil Procedure Code (V of 1908), O. 33, r. 10.*

O. 8, r. 14 of the Madras High Court Original Side Rules, which relates to 'paupers', refers not only to suits but also to proceedings. An application for probate is clearly a proceeding within the meaning of this rule, and it is open to the Court not only to entertain the application *in forma pauperis*, but also to make a further order granting probate to the applicant without payment by him of the requisite court-fee under Art. 11 of Schedule I of the Court-Fees Act. On this point the provisions of S. 19-I of the Court-Fees Act should be reasonably interpreted and the policy of the pre-existing law cannot be taken to have been altered thereby. In such cases, on the analogy of O. 33, r. 10, Civil Procedure Code, the Government has a first charge on the subject-matter of the pauper petition, that is, on the estate of the deceased.

In re *Will of Dawubai*, (1893) I.L.R. 18 Bom. 237, relied on.

Application praying for an order permitting the petitioner therein to file probate proceedings *in forma pauperis*.

G. A. Chellaiya Nadar for Petitioner.

G. Subramania Aiyar instructed by the Government Solicitor on behalf of the Government.

The Court delivered the following

JUDGMENT.—A novel question has been raised for which no precedent exists in this Court. This is a petition for probate. The petitioner says, he is a pauper and that is not disputed. The question raised, is, whether an order can be made granting him probate before payment by him of the

* Application No. 2925 of 1930. 26th November, 1930 and 9th December, 1930.

In the matter of The Estate of C. Govinda-swamy.

succession duty. S. 19-I of the Court-Fees Act reads thus:

"No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation."

This, in short, enacts that no order granting probate shall be made until the Court is satisfied that the proper fee has been paid. It is in terms mandatory. But does this mean that the rules relating to paupers are inapplicable to petitions for probate or letters of administration? O. 8, r. 14 of the Original Side Rules dealing with "paupers", refers not only to suits but also to proceedings. It provides for applications for leave to sue or institute *proceedings in forma pauperis.* An application for probate is clearly a proceeding within the meaning of this rule.

Let me take another provision of the Court-Fees Act, which is equally imperative. S. 6 says that no document chargeable with a court-fee shall be received by any Court unless such fee has been paid. This provision does not stand in the way of a person being given leave to sue *in forma pauperis.* In fact S. 6 of the Court-Fees Act is subject to, and controlled by, O. 33 of the first schedule, Civil Procedure Code and S. 141, Civil Procedure Code. O. 33 relates to suits by paupers and r. 8 exempts a plaint filed by a pauper, from payment of court-fee. Under S. 141, the procedure relating to suits by paupers, extends to proceedings also. In spite, then, of S. 6 of the Court-Fees Act, a Court can in the case of paupers, receive plaints bearing no stamps. I see no reason for holding that a different result follows from the wording of S. 19-I. It cannot be said that it is more mandatory (if such an expression is permissible) than S. 6. S. 19-I must be reasonably interpreted. What it enacts is, that the succession duty should be paid before, and not after, the order granting probate. This section was inserted by Act XI of 1890, which amended the Court-Fees Act. Duty was being collected, not on the applications for, but on the grants of probate or letters of administration; and in certain cases, it was found that persons were satisfied with merely obtaining an order on their petitions, without actually taking out probate or letters of administration. It was with a view to guard against this

evasion, that S. 19-I was inserted. This section thus prescribes as to *when* the court-fee is to be paid, and not by whom.

In the matter of The Estate of C. Govindaswamy.

Moreover it must not be needlessly assumed that the law was intended to be altered.

"General words are not to be so construed as to alter the common law, or the previous policy of the law, if a sense or meaning can be applied to them consistent with the intention of preserving the existing policy untouched." (*Halsbury's Laws of England*, Vol. 27, page 152.)

I find that my view receives support from In re *Will of Dawubai*[1]. The headnote in that case reads thus:

"Where an executor is not in possession of the property of his testator and cannot get possession of it, and where he has not himself the means of paying the necessary fees, he may be allowed to petition for, and, if entitled thereto, to obtain probate *in forma pauperis*."

The reasoning in that case is not impaired, as I have shown, by the subsequent amendment which inserts S. 19-I in the Court-Fees Act.

The question then arises, does the exemption extend to the succession duty payable? If a plaintiff is allowed to sue as a pauper, the only court-fee he is bound to pay is, what is payable, for service of process, he being relieved from paying all other court-fee (O. 33, r. 8, Civil Procedure Code). All fees chargeable under the Court-Fees Act, are, by virtue of S. 25, to be collected by stamps. Thus, the Act makes no distinction between succession duty and other species of court-fee. It follows from this, that in the case of a pauper applicant for probate, the exemption extends also to succession duty.

Lastly remains the question, how are the Government's interests to be safeguarded? On the analogy of O. 33, r. 10 of the Code of Civil Procedure, I hold that it has a first charge on the subject-matter of the petition, that is, the estate of the deceased.

B. V. V. *Order made.*

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1. (1893) I.L.R. 18 Bom. 237.

[The above decision has been followed by Gentle, J., in Application No. 819 of 1937 in T. O. S. No. 16 of 1917, dated 23rd August 1937. Rep.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Sina Thana Navana Nachiappa Chetty .. *Petitioner** (*Accused*)

v.

M. Nachiappa Chettiar .. *Respondent* (*Complainant*).

Nachiappa Chetty *v.* Nachiappa Chettiar.

Criminal Procedure Code (V of 1898), S. 503—Issue of commission to witness in Burma—Whether permissible.

S. 503 of the Code of Criminal Procedure does not empower the District Magistrate to issue a commission for the examination of any witness beyond British India or the territories of any Prince or Chief in India, where there is an officer representing the British Indian Government. Burma has now ceased to be a part of British India and a District Magistrate in British India is therefore not competent to issue a commission for the examination of a witness in Burma.

Empress v. *Moorga Chetty,* (1881) I.L.R. 5 Bom. 338 (F.B.) and *Emperor* v. *Corporal Allen,* (1909) 10 Cr.L.J. 571, referred to.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Ramnad dated 12th June, 1937, and made in L. Dis. 474 of 1937 in C. C. No. 23 of 1937, Sub-Divisional Magistrate, Devakottai.

N. Suryanarayana for Petitioner.

T. L. Venkatarama Aiyar for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is an application to revise an order of the District Magistrate refusing to issue a commission for the examination of a witness in Burma and the sole question for determination is whether the District Magistrate has jurisdiction to issue the commission. S. 503 of the Code of Criminal Procedure does not empower the District Magistrate to issue a commission for the examination of any witness beyond British India or the territories of any Prince or Chief in India, where there is an officer representing the British Indian Government, vide *Empress* v. *Moorga Chetty*[1] and *Emperor* v. *Corporal Allen*[2] and it is not disputed that Burma has ceased to be part of British India. The existence of Magistrates in Burma to

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* Cr. R. C. No. 384 of 1937, Cr. R. P. No. 352 of 1937. — 30th September, 1937.

1. (1881) I.L.R. 5 Bom. 338 (F.B.). 2. (1909) 10 Cr.L.J. 571.

whom commissions might issue if permissible under the Code of Criminal Procedure has no bearing and it follows that the District Magistrate has no power to issue the Commission. The Revision Petition therefore fails and is dismissed.

Nachiappa Chetty *v.* Nachiappa Chettiar.

B. V. V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

R. S. Sankaranarayana Reddiar .. *Petitioner* (Plaintiff)*

v.

The Taluk Board of Aruppukottai through its president and another .. *Respondents (Defendants).*

Sankaranarayana Reddiar *v.* Taluk Board of Aruppukottai.

Madras Local Boards Amendment Act (XI of 1930),—Rules under r. 11-A (5)—Levy of profession tax—Notice to produce accounts not the notice proper for levy of tax—Basis of taxation—R. 12 to Act XI of 1930—Notification of Government under that rule —Whether proper.

It is well settled that where a Local Board empowered to levy a tax adopts a basis different from that specified by the Act, which gives them the power, the levy is *ultra vires.* [Vide *Municipal Council of Mangalore* v. *The Codial Bail Press,* (1903) 14 M.L.J. 410: I.L.R. 27 Mad. 547.]

Where profession tax was levied on the petitioner for two half-years, the half year ending with 30th September 1930 and the half year ending with 31st March 1931 by a Taluq Board and notices of demand were served on the petitioner for each half year's levy but he failed to prefer an appeal soon after the service of notice with reference to the half year ending with 30th September 1930 and did it only after service of notice with reference to the second half year for both the half years after paying the taxes levied, and the appeal was filed on 11th May 1931, the date of service of notice being 10th April 1931 and the 10th May being Sunday, on the questions (1) that no notice was served on the petitioner calling on him to furnish a return as required by r. 11 under the Madras Local Boards Act as amended by Act XI of 1930 and (2) that the basis of taxation was wrong as being in contravention of r. 11 of Sch. IV of the said Act.

Held, that because a notice was given to the petitioner to produce his accounts, which the President had no power to call for under cl. (5) of r. 11-A, therefore it must be taken that provisions of r. 11-A were not complied with.

Held, further, that the basis of taxation on the notification of the Government under r. 12 of the Madras Act XI of 1930 which dispensed with notices in respect only of the half years ending with 31st March, 1931 and 30th September, 1931 was not proper, as it was *prima facie* inapplicable to the half year ending with 30th Sep. 1930 as well as extremely doubtful if r. 12 could empower the Government to issue the notification in question regarding the half years ending with April 1931 and assuming even that the Government had power to do so, the basis of taxation indicated in r. 11 should be the one followed.

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* C.R.P. No. 944 of 1934. 29th January, 1937.

Sankara-narayana Reddiar v. Taluk Board of Aruppu-kottai.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the decree of the Court of the Subordinate Judge of Devakottai in A.S. No. 37 of 1933 preferred against the decree of the Court of the District Munsiff of Ramnad in O. S. No. 51 of 1932.

A. Swaminatha Aiyar for Petitioner.

V. Ramaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The question in this Civil Revision Petition relates to the legality of the profession tax levied on the petitioner for two half years, *i.e.*, the half year ending 30th September 1930 and the half year ending 31st March 1931, by the Taluk Board of Aruppukottai in Ramnad District. The amount levied was Rs. 100 for each half year; notices of demand were served on the petitioner for each half year's levy. He failed to prefer an appeal soon after the service of notice with reference to the half year ending 30th September 1930, but he did it only after the service of notice with reference to the 2nd half year, for both half years after paying the taxes levied. The appeal was filed on the 11th May 1931, the date of service of notice being 10th April 1931 and the 10th May being Sunday. The president of the Taluk Board rejected the appeal as time barred, without placing the memorandum of appeal before the Board as he was bound to. This action of the president is not justified before me; the levy is impeached as not being in accordance with the provisions of the Local Boards Act and the rules framed thereunder.

Two main grounds are alleged, namely:

(i) No notice was served on the petitioner calling on him to furnish a return as required by r. 11-A of the Madras Local Boards Act, as amended by the Madras Act XI of 1930;

(ii) The basis of taxation is wrong as being in contravention of r. 11 of Schedule IV of the said Act.

The learned District Munsiff, who tried the suit, found that no notice under r. 11-A was served and that no evidence was adduced by the Taluk Board to prove that such a notice was served. The learned Subordinate Judge did not specifically give a finding in regard thereto, but only observed that the plaintiff admitted that a notice was given. On a reference

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to the plaintiff's evidence, it will be seen that notice was given to him to produce his accounts, which the President had no power to call for under cl. (5) of r. 11-A. Therefore it must be taken that the provisions of r. 11-A were not complied with. It is not disputed that the said rule would be applicable to the case but for a Government notification to which I shall presently refer. *Prima facie* the levy would be illegal; so found the learned District Munsiff. But the levy was sought to be justified in appeal on the ground that the Taluk Board was not bound to give a notice under r. 11-A having regard to the Government notification issued on the 6th October 1931 long after the levy. This contention prevailed with the Subordinate Judge who reversed the decision of the District Munsiff. The said notification runs thus:

"In exercise of the powers conferred by S. 179 of the Madras District Municipalities Act, r. 12 of the Schedule to the Madras Local Boards (Amendment) Act, 1930* (Madras Act X of 1930), (Amendment) Act, 1930 (Madras Act XI of 1930) Governor acting with Ministers is hereby pleased notwithstanding anything contained in the said Act, to direct that chairman of Municipal Councils, Presidents of Panchayats shall have power and shall be deemed to have had power until 30th September, 1931, to levy profession tax on companies and persons in respect of the half years ending 31st March, 1931 and 30th September, 1931, respectively, without serving the notice required by sub-r. (1) of r. 19/11-A of Schedule IV to the Madras District Municipalities Act, 1920 (Madras Act V of 1920)."

* Madras Local Boards Act (Madras Act XIV of 1920)."

This notification purports to have been issued under r. 12 of the transitional provisions of Madras Act XI of 1930. The said rule is to this effect:

"If any difficulty arises as to the first constitution or re-constitution of any Local Boards after the commencement of this Act or otherwise in first giving effect to the provisions of this Act or of the said Act as amended by this Act, the Local Government as occasion may require, may by order do anything which appears to them necessary for the purpose of removing the difficulty."

Prima facie the notification cannot apply to the half year ending 30th September 1930. In regard to the half year ending 31st March, 1931, it is extremely doubtful if r. 12 could empower the Government to issue the notification in question. Assuming however that the Government had the power to do so, it seems to me that the basis of taxation indicated in r. 11 should be followed. R. 11 clearly says that "the income shall be deemed to be" on a certain basis and in the case of a person

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assessed to income-tax for the year comprising the half year in question, "one half of the amount at which the profits and gains" of the business of the person against whom the levy is sought to be made "are computed under S. 10 of the Indian Income-tax Act, 1922, for the purpose of assessing the income-tax". It is not disputed that the petitioner was assessed to income-tax for the year 1930-1931 (*vide* Ex. A-1). The Taluk Board must therefore be deemed to have disregarded the basis enjoined on them under the Act and the rules. It is well settled that where a Local Board empowered to levy a tax adopts a basis different from that specified by the Act, which gives them the power, the levy is *ultra vires* (Vide *Municipal Council of Mangalore* v. *The Codial Bail Press*[1].) The levy is thus illegal in this case. I therefore reverse the decree of the learned Subordinate Judge and restore that of the District Munsiff. I direct each party to bear his or their own costs throughout.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR, AND MR. JUSTICE HORWILL.

Narayanaswami Mudaliar and others .. *Appellants** (*Defendants*)

v.

Ratnasabapathy Mudali and another .. *Respondents* (*Plaintiffs*).

Narayanaswami Mudaliar v. Ratnasabapathy Mudali.

Hindu Law—Earnings of father—No accounts to show he kept them separate from joint family property—No presumption as to blending so as to impress the entire property with the nature of joint family property—Will disposing of his properties, valid.

In a suit for partitition of the estate of *S* by the minor plaintiffs, the sons of *S* by his 3rd wife, against the defendants, the sons of *S* by his 1st and second wives, a will executed by *S* on 17th October, 1927, two months before his death, was attacked on the ground that all the properties in *S's* possession were joint family properties and that the will was accordingly invalid, on the question whether any of the plaint properties were the self-acquisitions of the deceased *S* since *S* had put in the common hotchpot all his self-acquisition in the shape of income from his calling as a physician,

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1. (1903) 14 M.L.J. 410: I.L.R. 27 Mad. 547.

* Appeal No. 229 of 1932. 23rd April, 1937.

which made the two indistinguishable from each other with the result that all his properties must be presumed to be joint family properties,

Held, that the presumption to be drawn in the circumstances of the case did not warrant the necessary inference of blending which the lower Court felt obliged to draw from the absence of accounts showing that *S* kept his earnings separate from the income derived by him from the joint family properties.

It is one thing to say Hindu law recognises 'blending' and attaches to such blending certain legal consequences, but it is another thing to say that there is any presumption in favour of blending of self-acquisition with joint family properties. There is no authority in favour of such presumption. The presumption, if any, can only be one of fact to be drawn in the light of all surrounding circumstances and in accordance with what is described in S. 114 of the Evidence Act as the common course of human conduct.

Beli Ram v. *Sardari Lal*, A. I. R. 1930 Lah. 613 at 617, disapproved.

Akkanna v. *Venkayya*, (1901) 12 M.L.J. 5: I.L.R. 25 Mad. 351; A. S. Nos. 363 of 1923 and 47 of 1925, judgment of Ramesam and Jackson, JJ., relied on.

Krishnamachariar v. *Chellammal*, A.I.R. 1928 Mad. 561, distinguished.

The analogy of a trustee mixing his own funds with the funds of *cestui que trust* cannot be called a true analogy to the blending in this case.

Appeal against the decree of the Court of the Subordinate Judge of Salem in O. S. No. 19 of 1930.

T. M. Krishnaswami Aiyar, V. Ganapathi Ayya and *M. R. Ramachandra Pant* for Appellants.

B. Sitarama Rao and *T. Krishna Rao* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This appeal arises out of a suit for partition of the estate of one Subbaraya Mudaliar, who died in December, 1927. The minor plaintiffs are the sons of Subbaraya's third wife. The first defendant is the son of his first wife and defendants 2 and 3 are the sons of his second wife. Subbaraya executed a will (Ex. I) on 17th October, 1927, whereby he disposed of all the properties, movable and immovable which he then had, partly in favour of the plaintiffs and partly in favour of the defendants. It is sufficient to say that he allotted to the plaintiffs a house and Rs. 6,000 in cash. The plaintiffs' advisers apparently felt that there was an unequal division of the estate and thought fit to institute this suit for partition on the footing that all the properties in Subbaraya's possession were joint family properties and that the will was accordingly invalid. The learned Subordinate Judge has upheld the contention of the plaintiffs and decreed a general partition. Hence this appeal by the defendants.

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Varadachariar, J.

A point was taken before the lower Court that Ex. I was not duly executed by Subbaraya. This formed the subject of the 2nd issue; the learned Subordinate Judge has found that the will was duly executed by Subbaraya in a sound disposing state of mind. The only question therefore that was argued before us is that raised by the first issue, namely:

"Whether any of the plaint properties are the self-acquisition of the deceased Subbaraya Mudaliar."

On behalf of the appellants, Mr. Krishnaswami Aiyar made a point that the lower Court had really proceeded on a theory of blending or throwing into the common stock which was not the case made in the plaint. Mr. Sitarama Rao pointed out in reply that no such objection had been raised in the grounds of appeal nor any surprise pleaded. Apart from this, however, we are not quite sure that the learned Subordinate Judge has proceeded on a theory of throwing into common stock. His observation in paragraph 17 of the judgment rather suggests that it was his view that Subbaraya's purchases and investments were never his self-acquisitions, because he never kept his earnings separate from the income derived from the joint family properties. As we have, however, heard the case fully on the merits, it does not seem to us necessary to consider whether really there has been any departure from the case made on the pleadings.

In the plaint, it was alleged in paragraph 4 that at a partition made 12 years before, there was a division of movables, cash, money-lending, etc., and that sometimes later, that is, in February, 1920, there was a partition of immovable properties between Subbaraya and his father and his brother. The obvious intention of this paragraph when taken with paragraph 5 was to suggest that the outstandings which belonged to Subbaraya's estate at the time of his death really represented the development of the money-lending business which came to Subbaraya at the partition. The plaint makes no reference anywhere to Subbaraya having had any substantial earnings of his own apart from the income yielded by the immovable properties or any other properties that came to him at the partition. The learned Subordinate Judge has found that Subbaraya was making a very substantial income from his profession as a native medical practitioner and that finding has not been challenged before us. He has also found that at

the partition between Subbaraya and his coparceners, Subbaraya obtained only certain immovable properties and did not obtain any cash or share in the money-lending business. The evidence also shows that the annual income from the immovable properties which Subbaraya got at the partition was somewhere below Rs. 200 per annum. It is not disputed that Subbaraya married three wives and had a large family to maintain. He had at least 5 sons and a daughter and two of his wives were alive for a long time. There can be little doubt that the maintenance of the family alone must have cost a great deal more than the income derived from what may be described as the ancestral properties that came to Subbaraya at the partition. The learned Subordinate Judge therefore rightly holds that Subbaraya's income from his profession as a native physician must have contributed largely to the accumulation of wealth. He nevertheless held that as Subbaraya maintained no accounts and it did not appear that even otherwise he made any distinction between his self-acquisitions and the joint family properties or between the income derived from the joint family properties and the income derived from the practice of his own profession, he must have confused or blended the two incomes so as to make the two indistinguishable from each other with the result that all his properties must be held to be joint family properties.

The above conclusion has been attacked before us by the learned Counsel for the appellants. It does not seem to us necessary to refer at length to the relevant authorities because many of them have been referred to and discussed in recent judgments of this Court, particularly in *Naina Pillai* v. *Daivanai Ammal*[1] and *Periakaruppan Chetty* v. *Arunachalam Chetty*[2] and the unreported judgment of Ramesam and Jackson, JJ., in A.S. Nos. 363 of 1923 and 47 of 1925. We may take the statement of the law in paragraph 227 of Mulla's book as representing the result of the authorities, namely, that:

> " Property which was originally the separate or self-acquired property of a member of a joint family may become joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it."

1. (1935) 43 L.W. 302.
2. (1926) 52 M.L.J. 571 : I.L.R. 50 Mad. 582.

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The author adds that a clear intention to waive his separate rights must be established. It has been suggested by Mr. Sitarama Rao that the present case is not exactly the one covered by this rule, because he argues that he does not concede that any of the suit properties was at any time the self-acquired property of Subbaraya. We do not think that that way of stating the question really solves the problem. It cannot be denied that Subbaraya's earnings at the moment they came into his hands were his separate property and that he had absolute power of disposal over them. That is certainly a stage which the plaintiffs must admit. No doubt they tried to avoid even that problem by suggesting in the plaint that all that Subbaraya possessed at his death must have come out of the immovable properties and the cash and money-lending business that he got for his share at a partition and, as we have already said, the plaint wholly ignored Subbaraya's independent earnings. But on the facts as now found the plaintiffs cannot get away from the fact that Subbaraya starts with a large amount of money in his hands which at the initial stage were undoubtedly at his absolute disposal and were not derived from the joint property. It is true that he had a small income every year from the ancestral properties as well. It is also true that that Subbaraya kept no accounts and we are not therefore in a position to say either that he brought both sets of income into one account or that he did not. If, as the authorities suggest, the onus lies upon the person who pleads that what was at any particular moment the separate property of a member of the joint Hindu family has at some later stage ceased to be so, to establish that it has been so dealt with as to lose its separate character, it does not appear to us that the plaintiffs can succeed merely upon the circumstance that we do not know how Subbaraya dealt with the two sets of income. It will be practically throwing the onus on the wrong person to hold that because we do not know how he dealt with the two sets of income, he must be presumed to have mingled them so as to lose his rights over his own earnings. Our attention has been drawn to the observations of the Lahore High Court in *Beli Ram* v. *Sardari Lal*[1] to the following effect:

"In the absence of any evidence that he was keeping his self-acquisitions

1. A.I.R. 1930 Lah. 613 at 617.

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strictly separate, the presumption is that the whole income of the family from whatever source derived went into the common chest out of which the family was maintained and some of the members were married."

We are, with great respect, unable to accept this presumption as well-founded. The expression "the whole income of the family" used by the learned Judges in the passage above quoted is somewhat ambiguous. It looks as if the learned Judges meant what each member of the family or any member of the family was *earning*. If so, we are not aware of any warrant for laying down a general presumption in the form enunciated by the learned Judges. It is not contended by Mr. Sitarama Rao that there is any presumption of Hindu law to that effect. It is one thing to say that the Hindu law recognises 'blending' and attaches to such blending certain legal consequences, but it is another thing to say that there is any *presumption* in favour of blending. We would respectfully say that we are aware of no authority in favour of such a presumption. The presumption, if any, can only be one of fact to be drawn in the light of all surrounding circumstances and in accordance with what is described in S. 114 of the Evidence Act as the common course of human conduct. Dealing with the income derived by a Hindu widow from her husband's estate, it was laid down as early as in *Akkanna* v. *Venkayya*[1] that the reasonable presumption to make in respect of any person having income at his or her absolute disposal is that he or she intended to reserve to himself or herself that power of disposal unless there is evidence to the contrary. This aspect of the matter has been emphasised in the unreported judgment of Ramesam and Jackson, JJ., already referred to and we need not labour it.

A decision of a Bench of this Court in *Krishnamachariar* v. *Chellammal*[2] may perhaps be said to state the position in terms somewhat favourable to Mr. Sitarama Rao's contention. The learned Judges in that case were prepared to draw an inference that a brother-in-law who had earnings of his own intended to throw his earnings into the common stock from the fact that he was contributing to the maintenance of his deceased's brother's widow not merely from the income of the admitted joint family property but even from his own earnings. It is not for us to say whether as an inference of fact

1. (1901) 12 M.L.J. 5: I.L.R. 25 Mad. 351.

2. A.I.R. 1928 Mad. 561.

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the learned Judges were justified in drawing such an inference or not, but it seems to us to put the matter too high to say, as the learned Officiating Chief Justice said, that mingling a portion of one fund with another fund raises a presumption not merely in respect of the portions mixed but also in respect of the balance of the earnings in the hands of the acquirer. We venture to think that the presumption to be drawn in the circumstances of the present case do not warrant the necessary inference which the learned Subordinate Judge felt obliged to draw from the absence of accounts showing that Subbaraya kept his earnings separate from the income derived by him from the joint family property.

Mr. Sitarama Rao called in aid the analogy of a trustee mixing his own funds with the funds of the *cestui que trust*; we do not think that that is a true analogy. In those cases the law only casts upon the trustee the onus of proving what his own funds are and distinguishing them from the funds of the *cestui que trust*. It is only if he is unable to do so, that a presumption in favour of the trust in respect of the whole fund is drawn. On the other hand, the result of the doctrine of blending is that the whole property becomes as a matter of law impressed with the character of joint property. It was also suggested that as Subbaraya must have been receiving something like Rs. 200 every year from the joint family property, that amount might have gone into some of the assets that existed at his death. But if he has been spending very much more than that amount on the maintenance of the joint family, there is no reason to presume that his separate moneys were spent on the maintenance of the family and that the income from the joint family went into the investments. Whatever may be the position, when the income from joint funds might have left a surplus over the requirements of the joint family, it does not seem to us necessary or reasonable to draw the inference, even where the income from the joint property is far below the requirements of the family that the investments made by the earning member were made in whole or in part out of the joint income. If the matter rested on presumptions alone, we should have held that the plaintiffs had not made out that the subsequent acquisitions of Subbaraya were either joint property or had been thrown into the joint stocks.

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Mr. Sitarama Rao however relied on two items of conduct: (1) that Subbaraya had dealt with both sets of properties on the same footing in his will and (2) that one item of immovable property which Subbaraya got at the partition had been sold by him in 1926 under Ex. IX for Rs. 1,000 out of which Rs. 300 is admittedly traceable to a hypothecation bond now in existence and nothing is known of the balance of Rs. 700. So far as the circumstances first mentioned is concerned, the Vakil who drafted Ex. I has spoken to the conversation between himself and Subbaraya in connection with the inclusion of the ancestral properties in the will. They are undoubtedly of very small value as compared to Subbaraya's acquisitions and we see no reason to think that the explanation given by the witness does not represent the truth. Even otherwise, the mere fact that Subbaraya might have made a mistake in assuming that he could dispose of the joint family property by a will when he was giving them to his own sons does not justify the inference that he intended to lose his power even over his self-acquired properties. Every reasonable presumption must be made in favour of validating the will as far as possible rather than in favour of invalidating it. We are therefore not prepared to draw an inference adverse to the appellants from the manner in which Subbaraya dealt with the two sets of properties in his will. The observations in *Isri Dutt Koer* v. *Hansbutti Koerain*[1] which Mr. Sitarama Rao relied on in this connection, must be read in the light of the facts found in that case and with due regard to the circumstance that at that time the prevailing view in respect of a Hindu widow's savings and investments was more strongly in favour of the theory of 'accretion' to the husband's estate than has been laid down in later authorities. The decisive facts in that case were that the widow's purchases consisted of 'shares of lands in which the husband was a shareholder to a larger extent' and the purchases were made within a short time after the husband's death.

As regards the proceeds of the sale under Ex. IX, the plaintiffs are no doubt entitled to contend that the hypothecation for Rs. 300 must be treated as joint family property. But we do not think that the inability of the first defendant to explain what Subbaraya did with the remaining Rs. 700 can be

1. (1883) L.R. 10 I.A. 150: I.L.R. 10 Cal. 324 at 337 (P.C.).

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used against the defendants. The first defendant was not a party to Ex. IX and there is nothing to suggest that he has kept back any information in his possession. The plaintiffs' advisers are aware of Subbaraya's investments as they are specified in the will and if by proximity of time or by other means it had been possible to suggest any connection between this sum of Rs. 700 and any of Subbaraya's investments, the position might have been different. For ought we know Subbaraya might have spent away the said sum of Rs. 700. We do not think therefore that that circumstance suggests any inference in plaintiffs' favour.

[This appeal having been set down "to be spoken to" and coming on in the presence of the said respective Advocates for the appellants and the respondents]

The Court made the following

ORDER.—The result is that the decree of the lower Court cannot be sustained in the form in which it has been passed. Likewise, the claim for partition of *all* the properties left by the deceased Subbaraya is not maintainable. As Subbaraya's will comprises joint family properties as well as properties which we have held to be self-acquired and as the plaintiffs have under that will been given certain benefits which they may not be entitled to retain if they prefer to repudiate the will, they must elect either to stand by the will or to repudiate it. We allowed the matter to stand over for sometime to see if the plaintiffs' next friend is able to do anything in the matter. But their learned Counsel represents that as the next friend is a woman, it will be better if following the English practice the Court itself holds an enquiry as to what is most beneficial to the minors in the circumstances and decides accordingly. See *Brown* v. *Brown*[1] and also the passage in Mullah's Transfer of Property Act, page 157. We must accordingly call upon the lower Court to make an enquiry after giving notice to both parties and ascertain whether it will be more advantageous for the plaintiffs to confirm the will and take the benefits conferred upon them by the will or to repudiate the will and limit their claim to a partition of such of the properties as according to the directions above contained must be held to be joint family properties. The report will be submitted before the 10th January 1937. Ten days for objections.

1. (1866) L.R. 2 Eq. 481.

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[On receipt of the Findings]

The Court made the following

ORDER. *Varadachariar, J.*:—The lower Court has now made a report to the effect that taking all things into consideration it will be more beneficial to the minor plaintiffs to take the interests given to them under their father's will than to be allowed to avoid that will so far as it purports to dispose of joint family property and take their shares in what is found to be joint family property. In view of the information set out in the lower Court's report, we agree that this is the better course in the interests of the plaintiffs. The decree for partition given by the lower Court is accordingly set aside except so far as it has allotted to the plaintiffs the very properties given to them under the will and in its place a decree will be substituted declaring that the plaintiffs are entitled only to the rights and properties given to them by their father's will.

There is some force in the observation in the lower Court's report that it will be convenient if provision is made in the present decree itself in respect of the monthly maintenance of Rs. 20 directed by the will to be paid to the plaintiff's next friend during the minority of the plaintiffs. As the learned Counsel for the defendants both in the lower Court and before us have very reasonably consented to a provision to that effect being made in the decree in this suit itself it is not necessary to consider whether otherwise that provision can or cannot be made in the suit as framed. The decree will accordingly contain a direction that the defendants shall during the minority of the first plaintiff pay Rs. 20 per mensem to the plaintiffs through their next friend, such payment to be made on the 15th of each month and that any sum not so paid will carry interest at 6 per cent. per annum till date of payment. This direction will also apply to all arrears of maintenance remaining unpaid upto this date; but in view of its being an accumulated amount, the defendants are given a period of six months from this date for paying up the amount and the amount will carry interest as above provided for only from the expiry of the six months' period. As the will itself provides that Rs. 6,000 directed to be paid in cash on the first plaintiff attaining majority shall be a charge on the property the decree shall contain a direction declaring it to be a charge on the plaint estate. It does not

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appear to be necessary to make any special provision at this stage in respect of the amounts directed to be paid for the marriage of the plaintiffs.

As regards the costs of this litigation, we are not able to accede to Mr. Sitarama Rao's contention that costs of all parties in both the Courts should come from the estate. We cannot help thinking that the plaintiffs' advisers have unfortunately been misled in choosing the course that they adopted. But as there may be something to be said in extenuation of their conduct in the way that the testator had dealt with the property in the will, we think the reasonable order as to costs in the circumstances will be that in this appeal each party do bear his costs but that in the Court below the plaintiffs should pay the defendant's costs and also pay the court-fee due to Government on the plaint. The court-fee will also be a first charge on the fruits secured to the plaintiffs under the decree.

K.C. —— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Gutta Venkayya and others .. *Appellants** (*Respondents*)

v.

Punyamurthula Venkata Rattamma (died) and others .. *Respondents* (*Appellant-Respondent*).

Venkayya v. Venkata Rattamma.

Civil Procedure Code (V of 1908), S. 100—Finding of fact—Appellate Court concurring in judgment of trial Court—Evidence approached from wrong standpoint—Interference in second appeal.

An appellate Court disposing of an appeal is not bound to repeat *in extenso* the arguments of the trial Judge which it accepts. But a party is entitled to a considered opinion of the appellate tribunal. It is not the first Court's view but that of the second Court that is final if the question is one of fact. Where the judgment of the appellate Court is extremely brief and the Judge is shown to have started the discussion of the evidence with a wrong statement of the law as to presumptions applicable to the case, and the whole question is shown to have been approached from a wrong standpoint, the High Court can set aside the finding in second appeal.

Appeals preferred under cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice

* L.P.A. Nos. 355 to 365 and 309, 390, 391 of 1926. 1st October, 1937.

Jackson, dated the 10th day of November, 1926, and passed in Second Appeals Nos. 1793, etc., of 1922 respectively, preferred against the decrees of the Court of the Principal Subordinate Judge of Kistna at Ellore in Appeals Nos. 402, etc., of 1921, respectively, preferred against the decrees of the Court of the Additional District Munsiff of Ellore in O.S. Nos. 214, etc., of 1920, respectively.

P. Venkataramana Rao, V.S. Narasimhachari and *P.V. Rajamannar* for Appellants.

The Advocate-General (Sir Alladi Krishnaswami Aiyar), V. Viyanna and *A. Satyanarayana* for Respondents.

The Court delivered the following

ORDER.—This is a Letters Patent Appeal from the judgment of Mr. Justice Jackson. The decree of the trial Court dismissing the suit was confirmed by the Subordinate Judge. In second appeal to this Court, the plaintiff succeeded. The Munsiff as well as the Subordinate Judge found that the defendants have no occupancy rights either under the Estates Land Act or independent of it, but nevertheless dismissed the suit on the ground that the plaintiff did not make out a right to eject. In second appeal, Mr. Justice Jackson accepted the findings of the lower Courts in regard to occupancy rights both within and outside the Act, but differing from the lower Courts held that the plaintiff was entitled to a decree for possession.

We have heard an argument from Mr. Venkataramana Rao on the question whether the plaintiff has or has not a right to eject, granting that the defendants are bound by the findings in regard to occupancy rights. On this point, on account of the course we propose to adopt, we wish to express no opinion at present. It is contended for the defendants that on the question of occupancy rights, the findings of the lower appellate Court as they stand, cannot be accepted. The first question in regard to those rights, which the learned Subordinate Judge had to decide was, was the grant made to the inamdar, the plaintiff's ancestor, of both the warams or of melwaram alone? The learned Subordinate Judge whose finding on a question of fact is final, starts the discussion of the evidence with a wrong statement of the law. He says that there is a presumption that an inam grant comprises both the

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melwaram and the kudiwaram. This is how he states the law:

"The decisions of the Privy Council reported in *Suryanarayana* v. *Pothanna*[1] and *Upadrashta Venkata Sastrulu* v. *Divi Sitharamudu*[2] are clear authorities to show that the presumption of law in the case of an inam grant was that both melwaram and kudiwaram were granted. These two decisions were discussed in the Full Bench ruling in *Muthu Goundan* v. *Perumal Iyen*[3] and the same conclusions were arrived at. It lay, therefore, on the defendants who set up occupancy rights that only the melwaram was given to the original grantee and that they had permanent rights of occupancy in the lands. Such a presumption of law is not rebutted in this case."

This was the view of the law taken at that time by the Madras High Court and the Subordinate Judge was bound to give effect to that view. He is not therefore to blame for the course he adopted. But since then, the Privy Council has clearly held, that the view taken by our Court, in the Full Bench case referred to by the Subordinate Judge, is wrong. In *Sivaprakasa* v. *Veeramareddi*[4] the Judicial Committee laid down the law thus in unequivocal terms:—

"It will be noticed that neither in the case of *Suryanarayana* v. *Pothanna*[1] nor in *Sethuratnam Aiyar* v. *Venkatachala Goundan*[5] is there a suggestion of a presumption in favour of the inamdar or pattadar on the one side or of the ryot on the other. It was further distinctly pointed out in *Upadrashta Venkata Sastrulu* v. *Divi Sitharamudu*[2] the passage already cited that each case must be considered on its own facts.

"A Full Bench of the Madras High Court, however, has in a recent case (*Muthu Goundan* v. *Perumal Iyen*[3]) held that underlying the exposition of their Lordships such an initial presumption is to be inferred. Their Lordships cannot help observing that in drawing this inference the learned Judges are clearly in error. Each case must be dealt with upon its own facts, with special regard to the evidence and circumstances therein.".

The question then is, does the wrong assumption of the lower appellate Court vitiate its finding or not? We entirely agree that it is not incumbent upon the appellate Court to repeat *in extenso* the arguments of the trial Judge which it accepts. But the party is entitled to a considered opinion of the appellate tribunal. It is not the first Court's view but that of the second Court, that is final if the question is one of fact. In this case, the point is either one of fact or is a mixed question of law and fact. The discussion of the Subordinate Judge is extremely brief and we are not entitled to speculate

1. (1918) 36 M.L.J. 585: L.R. 45 I.A. 209: I.L.R. 41 Mad. 1012 (P.C.).
2. (1919) 37 M.L.J. 42: L.R. 46 I.A. 123 at 128: I.L.R. 43 Mad. 166 (P.C.).
3. (1921) 40 M.L.J. 429: I.L.R. 44 Mad. 588 (F.B.).
4. (1922) 43 M.L.J. 640: L.R. 49 I.A. 286: I.L.R. 45 Mad. 548 (P.C.).
5. (1919) 38 M.L.J. 476: L.R. 47 I.A. 76: I.L.R. 43 Mad. 537 (P.C.).

Venkayya v. Venkata Rattamma.

that, if he had applied the right rule of law, he would still have agreed with the District Munsiff. On the contrary, the Subordinate Judge, while pointing out that the presumption may be rebutted, observes that, on the facts of the present case, it was not. What view he would have taken of the evidence, if he had not approached it from a totally wrong standpoint, we are not in a position to say. First, as regards, therefore, occupancy rights within the Act, we set aside the finding in paragraph 7 of the judgment of the lower appellate Court.

Then as regards occupancy rights independent of the Act, the judgment of the Subordinate Judge is equally open to attack. The District Munsiff in a judgment unnecessarily long, devotes several paragraphs to the discussion of the question. Have the defendants made out their case with reference to a lost grant or usage or prescription? Under each of these headings he considers the question. The Subordinate Judge completely misunderstands the District Munsiff. There are just three lines in his judgment which bear on this point and his reasoning and conclusion are contained in this short passage. We may quote his very words:

"The lower Court also showed in paragraph 22 of its judgment that the defendants could not have obtained permanent rights by prescription. I hold, therefore, that the defendants had no occupancy rights." (Paragraph 9.)

Is this not a thorough misunderstanding of the judgment of the trial Court? The Subordinate Judge has overlooked the discussion on the question of lost grant as also on the question of usage. Even on the point of prescription, he has nothing more to say than that he agrees with the lower Court. It is impossible to accept this finding as final in a second appeal. We therefore set aside that finding also. We call upon the lower appellate Court to rehear the appeal in regard to these two questions and write a fresh judgment containing findings as regards existence of occupancy rights within and independent of the Act, on the evidence already on the record.

Findings shall be returned in six weeks from this date. Objections 10 days thereafter.

All the questions that arise in the appeal will be argued on the receipt of the findings.

In pursuance of the above order the District Judge of West Godavari submitted the Finding.

Venkayya v. Venkata Rattamma.

The Court made the following

ORDER.—Mr. Viyanna, the plaintiff's counsel, says that in view of the recent inam legislation, the land in question has become an estate. On that ground he asks that the plaint may be returned to him for presentation to the proper Court. This is not opposed and an order is made accordingly. Return the plaint at once.

No order as to costs.

B. V. V. —— *Plaint returned.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

S. M. Chinnaswami Aiyangar .. *Petitioner* (Plaintiff)*

v.

Kanniah Naidu (deceased) his L. R. is the 3rd Respondent, *vide* affidavit dated 19th January, 1937, and others .. *Respondents (Defendants).*

Chinnaswami Aiyangar v. Kanniah Naidu.

Transfer of Property Act (IV of 1882), S. 68—Mortgagor and mortgagee—Suit on mortgage—Mortgagee abandoning the security and suing for money—Suit if maintainable.

Where a mortgagee sued for money due to him on a hypothecation bond, but limited his claim to a money decree on the personal covenant, stating that as the mortgaged properties had been sold away in a revenue sale by reason of the mortgagor's default, he did not wish to take proceedings to enforce the security and was content with a money decree, the trial Court found that only one of the items had been sold but not the other item and dismissed the suit holding that the proper course was for the mortgagee to file a suit to enforce the mortgage against the other item,

Held, that the suit was maintainable, either treating it as one falling under clause (*c*) of S. 68 or under clause (*a*) or clause (*b*) of that section. Only if it is under S. 68 (*c*) the plaintiff will have an unconditional right to sue for money but under clause (*a*) or clause (*b*), he may have to abandon the security. The Court has no power to insist upon his filing a mortgage suit even when he does not wish to have a mortgage decree.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsiff of Chingleput dated the 29th day of November, 1935, and passed in Small Cause Suit No. 622 of 1935.

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* C. R. P. No. 455 of 1936. 20th August, 1937.

Chinnaswami Aiyangar *v.* Kanniah Naidu.

D. Ramaswami Aiyangar for Petitioner.

V. S. Krishnaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The order of the lower Court is obviously unsustainable. The plaintiff sued for money due on a hypothecation bond but he limited his claim to a money decree on the personal covenant, stating that as the mortgaged properties had been sold away in a revenue sale by reason of the mortgagors' default, he did not wish to take proceedings to enforce the security and was content with a money decree. The lower Court found that only one of the items had been sold but not the other item; in this view it held that the proper course for the plaintiff was to file a suit to enforce the mortgage as against the other item. This view seems to me to have been proceeded on a misapprehension of the relevant provisions of the Transfer of Property Act.

If the case is viewed as one falling under clause (*c*) of S. 68 of the Transfer of Property Act, the plaintiff will have an unconditional right to sue for money but even taking it that the case falls either under clause (*a*) or clause (*b*) of S. 68, the second clause gives the power to the Court to stay a personal action only in the event of the mortgagee not abandoning his security. The Court has certainly no power to insist upon his filing a mortgage suit even when he does not wish to have a mortgage decree. The dismissal of the suit was therefore not warranted by law. I do not find that there is any other question remaining to be tried in the case as the lower Court has held that the debt is binding on defendants 3 to 6 as a family debt.

The result will be that the decree of the lower Court is set aside and a decree passed in plaintiff's favour personally against the second defendant (as the first defendant is reported to have since died), also against the assets of the first defendant, if any, in the hands of the third defendant and against the interests, if any, of defendants 3 to 6 in the joint family properties belonging to themselves and to defendants 1 and 2 for the plaint amount with interest on Rs. 100 at 6 per cent. per annum from the date of plaint up to date of payment. Plaintiff will be entitled to his costs both here and in the Court below.

S. V. V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

Matta Sura Reddi and another .. *Appellants* (Defendants)*

v.

Mara Rama Narasu .. *Respondent (Plaintiff).*

Sura Reddi *v.* Rama Narasu.

Transfer of Property Act (VI of 1882), Ss. 54 and 55, cl. (6) (b)—Document—Construction of—'Sale'—Claim for lien regarding prepaid purchase money—Whether under the circumstances permissible.

Where the first part of a document provided for a sale by the appellant's father and the third defendant to the plaintiff; the second part for a sale by the plaintiff to the appellant's father, and the third for certain other transfers by the plaintiff to the appellant's father and the circumstance that the various contracts embodied in one and the same document were to some extent interdependent, would not justify the contention that the arrangement embodied in the first part of the contract did not in law amount to a sale. The specific provision in the document to the effect that on the plaintiff's request appellant's father and the third defendant should come and execute a deed of sale and get it registered was itself the clearest indication that the parties meant it to be a 'sale'. The existence of another provision giving the appellant's father certain rights against the plaintiff as consideration for his having brought about the arrangement or having included in the settlement his brother's debt as well, did not detract from the true character of the transaction provided for by the first part of the document.

Zamindar of Polavaram v. *Maharajah of Pittapur,* (1936) 71 M.L.J. 347: L.R. 63 I.A. 304: I.L.R. 59 Mad. 910 (P. C.) and *Subramanian Chettiar* v. *Arunachalam Chettiar,* (1902) 12 M.L.J. 479: L.R. 29 I.A. 138: I.L.R. 25 Mad. 603 (P.C.), relied on.

The terms of such document clearly make the decree amounts the 'consideration' for the sale. In that sense, they were undoubtedly the 'price' within the meaning of S. 54 of the Transfer of Property Act, being amounts which were already due to the plaintiff from the other parties to the deed. The result of the arrangement embodied in the document is that the decree amount changes its legal character and becomes purchase money in the hands of the vendors. The case is one clearly of prepaid purchase money. And when the plaintiff had not declined to accept delivery of the property he was entitled to claim the benefit of the lien declared under S. 55, cl. 6 (*b*) of the Transfer of Property Act.

Webb v. *Macpherson,* (1903) 13 M.L.J. 389: L.R. 30 I.A. 238: I.L.R. 31 Cal. 57 (P.C.), referred to.

Appeal against the decree of the Court Subordinate Judge of Bezwada in O. S. No. 105 of 1933.

P. V. Rajamannar and *K. Subba Rao* for Appellants.

P. Satyanarayana Rao for Respondent.

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* Appeal No. 264 of 1935. 11th February, 1937.

Sura Reddi v. Rama Narasu.

The Court delivered the following

JUDGMENT.—This is an appeal by defendants 1 and 2 against a decree which gave the plaintiff a right to recover a sum of Rs. 3,540 and interest, by sale of the plaint properties. The plaint claimed two reliefs in the alternative, either specific performance of a contract of sale of the suit properties (evidence by Ex. A) or recovery of what the plaintiff described as prepaid purchase money as a charge on the properties contracted to be sold. The lower Court held that the claim for specific performance had become barred by limitation. As regards the money claim, the lower Court held that the plaintiff was not entitled in this proceeding to recover one portion of the consideration amount recited in Ex. A, namely, a sum of Rs. 1,750 representing what was due to the plaintiff from one Rami Reddi, the defendants' uncle under the decree in O. S. No. 25 of 1922. But it allowed in plaintiff's favour the other item of consideration, namely, the sum due under the decree in O.S. No. 24 of 1922 which had been obtained against the appellant's father.

Ex. A is an ill-drawn document; but on its proper construction it seems to us to embody several agreements which though to some extent inter-dependent, constitute several legal transactions. The first part of the agreement with which we are concerned in this litigation provides that the appellant's father and the third defendant should convey certain properties to the plaintiff in satisfaction of plaintiff's claims under the two decrees above referred to. The 2nd portion of the agreement provides for the plaintiff selling certain lands to the appellant's father on payment of a sum of Rs. 952-8-0. The 3rd portion of it provides that in consideration of the appellant's father having brought about that settlement including an arrangement in respect of the decree in O. S. No. 25 of 1922 the plaintiff should give up certain properties in favour of the appellant's father or pay him Rs. 1,000 at the time of the appellant's father registering the instrument in respect of the lands now in question. The final part of the agreement provides for another benefit to the appellant's father for the same consideration. Before us, the learned Counsel for the appellant's has objected to the lower Court's decree on two grounds: (1) that the transaction evidenced by Ex. A is not one of sale and that therefore plaintiff is not entitled to claim a charge as for

Sura Reddi *v.* Rama Narasu.

prepaid purchase money; (2) that in any event plaintiff has been himself guilty of breach of contract or at any rate has failed to fulfil his obligations under the contract and that therefore he is not entitled to claim the benefit of the lien declared under S. 55, cl. 6 (*b*) of the Transfer of Property Act.

In answer to the first argument, it is sufficient to say that the fact that Ex. A provides for various matters, does not necessarily detract from each part of it embodying a transaction of a known legal category. As stated already, the first part provides for a sale by the appellant's father and the third defendant to the plaintiff, the second for a sale by the plaintiff to the appellant's father and the third for certain other transfers by the plaintiff to the appellant's father. The circumstance that these various contracts embodied in one and the same document are to some extent inter-dependent does not justify the contention that the arrangement embodied in the first part of the contract does not in law amount to a *sale*. The specific provision in Ex. A to the effect that on plaintiff's request appellant's father and the third defendant should come and execute a *deed of sale* and get it registered is itself the clearest indication that the parties meant it to be a 'sale'. The existence of another provision giving the appellant's father certain rights against the plaintiff as consideration for his having brought about the arrangement or having included in the settlement his brother's debt as well, does not detract from the true character of the transaction provided for by the first part of the document. In *Zamindar of Polavaram* v. *Maharajah of Pittapur*[1], the Judicial Committee recognised that the mere fact that in the contract between the parties there might be various covenants, would not change the character of the transaction if in substance it was one of sale. In *Subramanian Chettiar* v. *Arunachalam Chettiar*[2], the Privy Council recognised that any consideration given to a lessor to persuade him to enter into the lease transaction was something outside the lease transaction and that the lease transaction stood by itself. The same reasons are equally applicable here.

As to the second contention, we have not been shown anything in the evidence which will disentitle the plaintiff to the benefit of the lien declared by cl. 6 (*b*) of S. 55 of the

1. (1936) 71 M.L.J. 347: L R. 63 I.A. 304: I.L.R. 59 Mad. 910 (P.C.).
2. (1902) 12 M.L.J. 479: L.R. 29 I.A. 138: I.L.R. 25 Mad. 603 (P.C.).

Transfer of Property Act. The terms of Ex. A clearly make the decree amounts the "consideration" for the sale. In that sense they are undoubtedly 'price' within the meaning of S. 54 being amounts which were already due to the plaintiff from the other parties to Ex. A. The result of the arrangement embodied in Ex. A is that the decree amount changes its legal character and becomes purchase money in the hands of the vendors. (See *Bassu Kuar* v. *Dhum Singh*[1].) The case is therefore clearly one of prepaid purchase money. There has been no suggestion nor was it ever proved that the plaintiff improperly declined to accept delivery of the property. The evidence shows that within a few days after Ex. A, the plaintiff sent word to the appellant's father asking him to execute and register a sale-deed in terms of Ex. A. The appellant's father, without complying with the request, merely took advantage of the execution of Ex. A and applied to enter up satisfaction of the decree in O. S. No. 24 of 1922. The plaintiff naturally objected to that prayer, alleging that as appellant's father had not given up possession nor executed a registered deed of sale as required by Ex. A, satisfaction of the decree should not be entered up. This Court no doubt held in *Ramanarasu* v. *Venkata Reddi*[2] that even the existence of Ex. A as an executory contract justified the application to have the decree entered up as satisfied. But the opposition to that prayer will not by any means constitute a breach of contract on the plaintiff's part; on the other hand he was insisting on the terms of Ex. A being carried out. Even after the decision of the High Court in *Ramanarasu* v. *Venkata Reddi*[2], he sent notices insisting upon the carrying out of the sale contract and this suit was instituted in the alternative, praying for specific performance as well. It is therefore impossible to hold that the plaintiff has declined to accept delivery of the property. All that has been said against him by appellant's learned Counsel is that there are other terms in Ex. A which the plaintiff has not fulfilled. Assuming it to be so, we do not see how that excludes the application of S. 55, cl. 6 (*b*). As held by the Privy Council in *Webb* v. *Macpherson*[3] the lien given by that section can be excluded only by a contract to the contrary.

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1. (1888) L.R. 15 I.A. 211: I.L.R. 11 All. 47 (P.C.).
2. (1932) 63 M.L.J. 598: I.L.R. 56 Mad. 198.
3. (1903) 13 M.L.J. 389: L.R. 30 I.A. 238: I.L.R. 31 Cal. 57 (P.C.).

Sura Reddi v. Rama Narasu.

The appeal accordingly fails and is dismissed with costs.

K. C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BURN.

A. R. Ramanuja Mudaliar .. *Appellant** (*Respondent*)

v.

L. C. Sundara Varadachariar and others .. *Respondents* (*Nil and Petitioner*).

Ramanuaj Mudaliar v. Sundara Varadachariar.

Indian Companies Act (VII of 1913), S. 183—Winding up of a company by order of Court—Liquidator's decision to assign a decree in favour of the highest bidder in auction—Sanction of Court—Irregularity in conduct of sale alleged—O. 21, r. 90, Civil Procedure Code, does not apply in the circumstances.

Where a company was compulsorily wound up by order of Court and the liquidators felt a certain asset in the shape of a decree in favour of the directors of the company should be sold by auction and accordingly applied to the District Judge for directions under S. 183 of the Companies Act and having obtained sanction sold the decree to the highest bidder which was attacked later by a liquidator in the proceedings taken by the purchaser to be brought on record as the decree-holder and the District Judge set aside the sale as improperly conducted,

Held, that the District Judge had no power to set aside the sale. The appellant having become the purchaser and having got assignment of the decree the Court had no right to set aside the contract. The principles of O. 21, r. 90 of the Civil Procedure Code did not apply, but even if they did, there would be no ground for setting aside the sale.

Appeal against the order of the District Court of Chittoor dated 13th February, 1936 and made in C.M.P. No. 206 of 1935 in O.P. No. 30 of 1933.

P.R. Srinivasan for Appellant.

Respondents not represented.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The Sundara Shanmuga Vilas Prize Chit Fund, a company registered under the Indian Companies Act, is being wound up in the Court of the District Judge of Chittoor as the result of a compulsory winding up order passed by this Court. This Court appointed three official liquidators, who on taking over charge of the assets came to the conclusion that one asset, a decree in favour of the directors of the company, should be sold by auction as it would be

* A.A.O. No. 277 of 1936. 21st October, 1937.

Ramanuja Mudaliar *v.* Sundara Varada-chariar.

Leach, C.J.

too expensive to undertake execution proceedings. They accordingly applied to the District Judge for directions under S. 183 of the Act and he ordered the decree to be sold by auction. In accordance with this order an auction was held on the 1st November, 1934, and the appellant bid Rs. 25. As there was no higher bid he was declared to be the purchaser. On the 5th November, 1934, the three liquidators executed a deed assigning the decree to the appellant who on the 17th January, 1935, applied to be brought on the record and to have leave to execute the decree. Before he could take advantage of his purchase, one of the liquidators applied to the District Judge for directions in order to get the sale set aside. By an order dated 13th February, 1936, the District Judge set aside the sale as he considered that there were good grounds for thinking that the sale was not properly advertised and on general grounds he thought that a doubtful asset should not be sold. It is from this order that the present appeal has been preferred.

It is clear that the learned District Judge had no power to set aside the sale. The decree was sold by auction and the appellant was the highest bidder. The appellant having become the purchaser, the official liquidators with the sanction of the Court assigned the decree to him. In these circumstances the Court had no right to set aside the contract. The principles of O. 21, r. 90 of the Code of Civil Procedure do not apply, but even if they did there would be no ground for setting aside the sale. It is not suggested that the appellant was a party to any fraud. The appellant having bought the decree is entitled to the benefit of it, and the order of the learned District Judge must, therefore, be set aside. Having succeeded the appellant is entitled to costs which will be paid out of the assets of the company.

K. C. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE GENTLE.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

M.A.L.A.R. Aryan Chettiar .. *Respondent.*

F.B. — Commissioner of Income-tax, Madras *v.* Aryan Chettiar.

Income-tax—Two partnerships at Rangoon and Saigon—Partners same as both—Profits of Saigon business—Remittance of to Rangoon firm—Rangoon firm assessed to tax—Assessee contending that firm not liable—Assessment cancelled—Then partner individually assessed—No allocation of profits to individual partners—If assessment invalid—Profits escaped assessment—Liable.

Where an assessee was a partner in a business carried on in Rangoon consisting of three partners under vilasam M.A.L. and the same partners were also the sole partners in another business at Saigon under the same vilasam, and where remittances were made to the Rangoon partnership by the Saigon partnership from out of its profits, and on the contention of the assessee it was held in Rangoon that the Rangoon partnership business was not liable to be assessed to income-tax in respect of this sum, the assessee as an individual is to be deemed to be in receipt of these profits *pro anto* to the extent of his share in those profits and assessable as such, also as the profits have escaped assessment. It is not necessary that there should be an allocation amongst the partners of the profits to constitute receipt of profits.

Semble: The partnership business of Rangoon was itself assessable in respect of those profits.

Reference by the Commissioner of Income-tax, Madras, under S. 66 (2) of the Indian Income-tax Act of 1922.

M. Patanjali Sastri for the Petitioner.

K. S. Krishnaswamy Aiyangar for *P. R. Srinivasan* for the Respondent.

The Court delivered the following

Beasley, C.J.

JUDGMENTS. *The Chief Justice*.—The question propounded is:

"Whether the sum of Rs. 59,968 remitted in 1931-1932 by the Saigon partnership out of its profits to the Rangoon partnership amounted to a receipt of profits *pro tanto* by the partners in 1931-1932 so as to be assessable in their hands."

The assessee was and is a partner in a money-lending business carried on in Rangoon consisting of three partners under the vilasam of M.A.L. The same three partners are the sole partners in a similar business carried on in Saigon under

* O. P. No. 246 of 1935. 31st March, 1936.

F.B.

Commissioner of ncome-tax, Madras *v.* Aryan Chettiar.

Beasley, C.J.

the same vilasam. During the period commencing with the 21st May, 1931 and ending on the 24th March, 1932, by means of three remittances made by telegraphic transfers and by bank drafts a sum of Rs. 59,967-8-0 was remitted by Saigon to Rangoon. It has been found as a fact that these remittances came out of profits made by the Saigon partnership. Under these circumstances the share of the assessee in that sum was assessed under S. 34 of the Indian Income-tax Act. The contention put before the Income-tax Officer was that the partnership itself ought not to be assessed and it appears also that the advocate who appeared before the Income-tax Officer, Rangoon, who had charge of this matter admitted that the individual partners should instead be assessed. In any case quite apart from the admission made, the Income-tax Officer, Rangoon, held following the decision in *Martin & Co.* v. *Commissioner of Income-tax, Bengal*[1] that the contention of the assessee was correct and that the partnership was not liable to be assessed to income-tax. The Income-tax Officer here then proceeded to assess the partners individually. The contention raised before us is that they are not liable to be so assessed; and it was strenuously argued that upon the authority of the case already referred to, this being a remittance from a separate entity, namely, the Saigon partnership to another entity, namely, the Rangoon partnership, the partnership was not liable to be assessed. From this Mr. K.S. Krishnaswami Aiyangar who appeared on behalf of the assessee contended that the partner also could not be assessed though he conceded that this sum could not escape assessment but was quite unable to state upon whom the assessment was to be made other than the individual partners or the partnership. His argument was this that this was a remittance of a lump sum of profits and until there had been an allocation amongst the partners of their shares in these profits, the individual partners could not be held to have received those profits and that until there was such an allocation, it could not be said that there was any receipt by them of the profits. He relied upon the decision of this High Court in *S. L. S. Chettiappa Chettiar* v. *Commissioner of Income-tax, Madras*[2]. The answer to this contention seems to me to be this that there was admittedly a receipt in British India of profits gained abroad. By whom were those profits

1. (1930) 4 I.T.C. 478. 2. (1930) 4 I.T.C. 188.

F.B.

Commissioner of Income-tax, Madras v. Aryan Chettiar.

Beasley, C.J.

received? If the contention of the assessee before the Income-tax Officer was correct, then those profits were not received by the partnership in such a way as to render the partnership itself assessable. But as those profits had been received, they must have been received by somebody. The only other alternative is that they were received by the partners individually and there does not seem to me to be any other possible alternative. If the partnership itself is not assessable, clearly in my view, the individual partners are. Although it may be true that they have not received this money into their own hands, the receipt of this money by the partnership was a receipt on behalf of the partners and if, as is contended by the assessee, the decision in *S.L.S. Chettiappa Chettiar* v. *Commissioner of Income-tax, Madras*,[1] goes to the length of saying that until there is an allocation amongst the partners of the profits there can be no receipt, with great respect, I feel myself unable to agree with it. The deed of partnership of the Rangoon business sets out the shares to which each of the three partners is entitled and, the money having been received by the partnership on behalf of the partners, it is merely a matter of arithmetic to ascertain what the share in those profits of each of the individual partners is. There is nothing in the Indian Income-tax Act which says that a partnership or a firm is to be assessed first. Either the firm itself is liable to be assessed or its individual partners. In this case an attempt was made to assess the firm and yielding to the contention raised by the assessee the firm was absolved from assessment and the individual partners were sought to be assessed. I think that the Income-tax Officer was mistaken in holding that the partnership was not liable to assessment in respect of those profits as in my opinion *Martin's case* already referred to does not touch this point at all. These profits therefore escaped assessment in the hands of the firms. It was open to the income-tax authorities to assess the partners individually. It seems to me that if any authority for such a procedure is needed, it is to be found in the decision in *Neemchand Daga* v. *Commissioner of Income-tax, Bengal*[2]. In my view, the assessee was clearly assessable to income-tax in respect of his share in the sum of Rs. 59,968. The question must, therefore, be answered in the

1. (1930) 4 I.T.C. 188. 2. (1931) 5 I.T.C. 206.

affirmative. The Commissioner of Income-tax will get Rs. 250 costs.

King, J.—I agree.

Gentle, J.—I agree.

S. V. V. —— *Question answered in the affirmative.*

F.B. Commissioner of Income-tax, Madras *v.* Aryan Chettiar. Beasley, C.J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE NEWSAM.

Kovalakudi Singam Aiyangar and others .. *Appellants* (Plaintiffs 1 to 5)*

v.

K. Kasturiranga Aiyangar and others .. *Respondents (Defendants).*

Singam Aiyangar *v.* Kasturiranga Aiyangar.

Madras Hindu Religious Endowments Act (II of 1927), S. 73 (3)—Applicability—Right claimed by third parties to Prasadams *offered to deity—Suit to declare absence of right and for injunction—Whether relates to "administration or management" of temple.*

The plaintiffs, who were the worshippers of a temple, instituted the suit for a declaration that certain other persons known as *Sukhavasis* were not entitled to any fixed share of the *Prasadams* offered to the deity or to a cash payment in lieu thereof. They also prayed for an injunction restraining the defendant trustees and members of the Devasthanam Committee from recognising the right put forward by the *Sukhavasi* defendants. It was contended that the suit was not maintainable by reason of S. 73 (3) of the Madras Hindu Religious Endowments Act.

Held, that what the plaintiffs sought was a declaration against certain third parties, that the relief for injunction was merely consequential and did not alter the character of the suit, and that as the suit did not relate to the "administration or management" of the temple it was not barred by S. 73 (3) of the Madras Hindu Religious Endowments Act.

Appeal against the decree of the District Court of Trichinopoly in O. S. No. 3 of 1929.

T. M. Krishnaswami Aiyar, V. N. Venkatavaradachariar and *R. Gopalachariar* for Appellants.

S. T. Srinivasagopalachariar, K. R. Rangaswami Aiyangar and *A. Srirangachariar* for Respondents.

The Court delivered the following

JUDGMENTS: *Venkatasubba Rao, J.*—The learned District Judge has in respect of almost every question of fact decided

Venkatasubba Rao, J.

* Appeal No. 267 of 1931. 29th September, 1937.

Singam Aiyangar v. Kasturiranga Aiyangar. — Venkatasubba Rao, J.

in favour of the plaintiffs, but has come to the conclusion that the suit is not maintainable by reason of cl. 3 of S. 73 of the Hindu Religious Endowments Act (Madras Act II of 1927). The question to be decided in the appeal is, whether the view of the learned Judge that the suit is barred by the provision referred to above, can be sustained.

The suit has been brought by certain five worshippers in the Sri Ranganathaswami temple at Srirangam with the consent obtained of the Board of Commissioners. The object of the suit is to get a declaration in respect of a class of persons known as *Sukhavasis*. The plaintiffs complain that these *Sukhavasis* have been asserting a claim to a certain fixed share of the *Prasadams* offered to the deity, and that in assertion of that right, they have gone the length of claiming a cash payment in lieu of their share of the *Prasadam* when that is not available. The questions which the learned Judge had to decide were: (1) whether the *Sukhavasis* had been in enjoyment of the allowances, as alleged by them, continuously for such a period, as would serve to raise a presumption of a legal origin, and (2) whether the emoluments were attached to the performance of any religious office, service or duty in the temple in question. On both these matters, the learned District Judge in a lucid and closely reasoned judgment, has recorded findings, as already stated, against the defendants. We may incidentally observe here that the word '*Sukhavasi*' means 'one who lives in comfort without any particular employment' (Tamil Lexicon published by the University of Madras). The respondents' counsel has not challenged these findings of fact, and the question that now has to be decided therefore is one of law, namely, whether or not the suit is barred under S. 73 (3) of the Act.

The lower Court has, in our opinion, been misled by the clumsy drafting of some of the paragraphs in the plaint. There were three sets of defendants impleaded: first, the trustees of the temple; secondly, the members of the Trichinopoly Hindu Devasthanam Committee; and thirdly, the *Sukhavasis*. On a close examination of the plaint, it is perfectly clear that it is not sought to fetter the discretion of the trustees in doling out the offerings to such persons as they think deserving; the *Sukhavasis* are under no particular disability, and they may, like any other worshippers or pilgrims, receive, and be given

the *Prasadam*. It is the right put forward by the *Sukhavasis* to a fixed share that has been objected to. To claim a right to charity is a contradiction in terms, and what the *Sukhavasis* have been getting according to them, are not charitable doles but perquisites, which could be claimed as a matter of right, attached as they are, to the performance of certain services. Unfortunately however, the wording of the plaint seems to suggest that the suit was intended to prevent the *Sukhavasis* getting any charity whatsoever, as though they were marked out for some special penalty.

A brief reference to the facts that immediately preceded the institution of the suit, will serve to make the prayers in the plaint clear. The *Sukhavasis* are of the Vadagalai persuasion, and their claim to a fixed share was generally looked on with disfavour by the Tengalais. The plaintiffs suggest that in dealing with the claim put forward by the *Sukhavasis*, the trustees or the members of the committee are generally swayed by sectarian motives. It seems unnecessary to go into this question, nor would it be right on the material before us to say that the plaintiff's complaint is justified. What really happened however was this: In several judicial proceedings the right of the *Sukhavasis* was negatived. In 1926 the Religious Endowments Board likewise refused to recognise the right. In 1927 the Devasthanam Committee, when considering the budget proposals, also declared against the right claimed; but in 1928 they revised their decision and resolved to make provision in the budget for payments to the *Sukhavasis*. Four out of five trustees of the temple dissented from the committee's view; and the plaintiffs, as worshippers, claim in the suit several reliefs including an injunction restraining the trustees and the members of the Devasthanam Committee from recognising the right put forward by the *Sukhavasi* defendants. There is also a declaration that has been prayed for, but the prayers have been so worded as to suggest, as already stated, that the *Sukhavasis* are to be deprived of any share in the offerings.

Now that the misapprehension has been got rid of, does the provision referred to oppose any bar to the maintainability of the suit? S. 73 was in some respects recently amended; but the provisions in force when the suit was filed, was as it stood before the amendment. For the present purpose, this makes little difference, and as the learned Judge rightly points out, the

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reliefs mentioned in the section, do not cover any of the reliefs claimed in the suit. It has been held by the Judicial Committee in *Abdur Rahim* v. *Muhammad Barkat Ali*[1] that the words 'further or other relief' in S. 92, Civil Procedure Code, must on general principles of construction be taken to mean relief of the same nature as those described in clauses (*a*) to (*g*). Both the reasoning and the conclusion of their Lordships apply to the provision in question, which has been modelled on the aforesaid section of the Code. It has been further held in the same case, that in enacting S. 92, the legislature could not have intended to include relief against third parties under the general words 'further or other relief'.

Applying the same reasoning, the question we have to decide is, whether the words of the present provision can have the effect of abolishing or extinguishing substantive rights possessed under the law. As was pointed out in *Vaidhyalinga Pandara Sannadhi* v. *Ranganatha Mudaliar*[2] to which one of us was a party, there is a marked difference between the wording of the relevant part of S. 73 (3) and the corresponding portion of S. 92 (2). Under the latter provision, the suits contemplated are those filed claiming *any of the reliefs* specified in the section. But the words in the present Act are much wider and more comprehensive, for what is declared is, "No suit in respect of the administration or management of a religious endowment shall be instituted", except as provided by the Act.

The learned Judge has held that as the reliefs claimed are not covered by those in the section, the suit does not lie. The short answer to that argument is, that the present suit is entirely outside the scope of S. 73. The suit, if the scope is properly understood, is not 'in respect of the administration or management' of the temple in question. The right of the trustees or the committee to make charitable doles—including the giving of doles to the *Sukhavasi* defendants—is not questioned; it is not sought to fetter their discretion in any way whatsoever. No question has been raised involving the 'administration or management' of the temple either by the trustees or by the committee. What the plaintiffs seek is, to have their right declared as against *certain third parties*, that

1. (1927) 54 M.L.J. 609: L.R. 55 I.A. 96: I.L.R. 55 Cal. 519 (P.C.).
2. (1933) 66 M.L.J. 98: I.L.R. 57 Mad. 362.

is to say, *strangers to the trust* (that being the true position of the *Sukhavasis*). Such a suit, it seems to us, does not come within the purview of S. 73 and cannot be said to be barred by its provisions. The further relief prayed for that the trustees and the members of the committee shall be restrained from giving, and the *Sukhavasis* from receiving, is merely ancillary to and consequential upon the declaration. That, in our opinion, does not alter the main character of the suit. In this view the obtaining by the plaintiffs of the sanction of the Board was a superfluous act; but that makes no difference.

The appeal is allowed and the plaintiffs will have a decree in the terms mentioned above.

As to costs, the order made by the lower Court will stand, and in this Court the only order we propose to make is, that the plaintiffs will be paid a consolidated amount of Rs. 350 (Rupees three hundred and fifty only) as costs of the appeal from the temple funds.

The memorandum of objections is dismissed. No costs.

Newsam, J.

Newsam, J.—I agree entirely. There is nothing in S. 73 of Act II of 1927 to preclude the Court from granting a decree declaring that "*Sukhavasis*" are not as of right entitled to receive a fixed share of the *Prasadams* and an injunction restraining the trustees from allowing such a claim by making cash payments to them as such or in lieu of any so-called vested interest in the offerings. On the findings of the learned trial Judge, which are unchallenged and which we accept, the plaintiffs must at least succeed to this extent. But obviously no decree can be passed restraining the right of the trustees to distribute *Prasadams* by way of charity to any persons whom in their discretion they deem to be worthy recipients. S. 73, as I understand it, limits the powers of the Court to interfere with the administration and management of Religious Endowments, and restricts the right of suits of persons interested to such matters as appointing and removing a trustee, vesting property in a trustee, determining what sum should be allocated to a particular purpose, and kindred matters. But for obvious reasons Courts are prevented by this section from accepting any invitation to interfere with the details of administration or to fetter the discretion of trustees in minor matters. The machinery is provided in the Act itself for the control of

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trustees of temples by Committees and by the Hindu Religious Endowments Board.

I respectfully agree with my learned brother as to the terms of the decree which should be passed in this suit.

B. V. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

S. A. Annamalai Chettiar .. *Petitioner* (2nd Respondent)*

v.

Chellammai Achi, minor by father and next friend, V.S.S. Sathappa Chettiar and another .. *Respondents (Petitioner and 1st Respondent).*

Annamalai Chettiar v. Chellammai Achi.

Sale—Proclamation—Material irregularity alleged—Inadequacy of price—Proof direct whether necessary—C. P. Code (1908), O. 21, R. 90.

It is no longer necessary to prove the causal connection between the inadequacy of price of a property and the material irregularity in the conduct of the sale of the same by means of direct evidence; but a sale could be set aside if the Court were satisfied upon the facts proved in the case that there were circumstances from which a reasonable inference might be drawn that the inadequacy in price was the result of the material irregularity, although mere inadequacy of price, without either direct evidence or proof of such circumstances as mentioned above, would not be sufficient to set aside the sale.

Venkatasubbaraya Chetti v. *Zamindar of Karvetinagar,* (1896) I.L.R. 20 Mad. 159; *Sheorutton Singh* v. *Net Lall Sahu,* (1903) I.L.R. 30 Cal. 1 and *Mahabir Pershad Singh* v. *Dhanukdhari Singh,* (1904) I.L.R. 31 Cal. 815, referred to.

Petition under Ss. 115 of Act V of 1908 and 107 of the Government of India Act, praying the High Court to revise the order of the District Court of Ramnad, dated 11th July, 1936 and made in C.M.A. No. 60 of 1935, presented against the order of the Court of the Subordinate Judge of Sivaganga, dated 5th August, 1935 and made in E.A. No. 505 of 1934 in E.P. No. 30 of 1933 in O.S. No. 53 of 1932.

K. Rajah Aiyar for Petitioner.

M. S. Venkatarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—It has been conceded by Mr. Rajah Aiyar, the counsel for the petitioner, that there was no proclamation before the property, which happens to be one-eighth share in a

* C.R.P. No. 985 of 1936. 27th August, 1937.

Annamalai Chettiar *v.* Chellammai Achi

village, was sold by public auction. Admittedly this is a material irregularity. It was not seriously contested that the price at which the property was sold, was grossly inadequate. A firm offer was made by the objecting creditor in the lower appellate Court to the extent of about double the price for which the property was knocked down at the auction sale. It was also admitted that the purchaser is a close relation of the judgment-debtor.

The only point which was seriously contested by the Counsel for the petitioner was that the sale could not be set aside as the respondent had failed to prove that the inadequacy in price was caused by reason of such irregularity.

At one point of time there was a divergence of views between the High Court of Allahabad on the one hand and those of the High Courts of Madras and Calcutta on the other. The High Court of Allahabad was of opinion that the inadequacy in the sale price was not sufficient to set aside the sale in the absence of direct evidence which established a causal connection between the material irregularity and the inadequacy of price fetched at the sale. It was on the contrary held by the High Court of Madras in *Venkatasubbaraya Chetti* v. *Zamindar of Karvetinagar*[1] that the fact that the inadequacy of price fetched at the auction was the result of the material irregularity committed in conducting the sale, might ordinarily give rise to an inference that "the low price was a consequence of irregularity even though the manner in which the irregularity produced the low price be not definitely made out". The High Court of Calcutta had taken a similar view in *Sheorutton Singh* v. *Net Lall Sahu*[2] and *Mahabir Pershad Singh* v. *Dhanukdhari Singh*[3].

On account of this divergence of views, the Code of Civil Procedure had to be amended and the words "unless upon the facts proved the Court is satisfied" have been substituted to give effect to the decisions of the High Courts of Calcutta and Madras. It is no longer necessary to prove a causal connection between the two by means of direct evidence; but a sale could be set aside if the Court were satisfied upon the facts proved in the case that there were circumstances from which a reasonable

1. (1896) I.L.R. 20 Mad. 159. 2. (1903) I.L.R. 30 Cal. 1.
3. (1904) I.L.R. 31 Cal. 815

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inference might be drawn that the inadequacy in price was the result of the material irregularity, although mere inadequacy of price, without either direct evidence or proof of such circumstances as mentioned above, would not be sufficient to set aside the sale.

In this case, material irregularity has been admitted and the inadequacy in price which the property fetched at the sale was not seriously contested. The fact that there was no proclamation might legitimately give rise to an inference that if the sale had been proclaimed, the intending purchasers might have been present to bid for the property which might have fetched a higher price in consequence. It was, in any case, open to the lower appellate Court to draw this inference and having done so, it cannot be said that it exercised a jurisdiction which did not vest in it. It cannot, therefore, be questioned in revision.

I would, therefore, dismiss the petition with costs.

K. C. *Petition dismissed.*

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MADRAS ACTS, 1937.

THE MADRAS CHILDREN (AMENDMENT) ACT, 1936.

ACT No. I OF 1937.

[31*st December*, 1936 *and* 28*th January*, 1937.

An Act further to amend the Madras Children Act, 1920, *for certain purposes.*

WHEREAS it is expedient further to amend the Madras Children Act, 1920, for the purposes hereinafter appearing;

AND WHEREAS the previous sanction of the Governor-General has been obtained to the passing of this Act;

It is hereby enacted as follows:—

Short title.

1. This Act may be called the MADRAS CHILDREN (AMENDMENT) ACT, 1936.

Amendment of section 25, Madras Act IV of 1920.

2. (1) Section 25 of the Madras Children Act, 1920 (hereinafter referred to as the said Act), shall be re-numbered as sub-section (1) of that section and in the sub-section as so renumbered—

(i) after clause (*b*), the following word and clause shall be inserted namely:—

"or

(*c*) committed to the custody of any suitable person, whether a relative or not, who is willing to undertake the care of the youthful offender, until he attains the age of sixteen years or for any shorter period;"; and

(ii) in the last paragraph, for the words "in either case," the words, letters and brackets "in any case in which it passes an order under clause (*a*) or clause (*b*)" and for the words "under the supervision of a person named by the Court," the words "under the supervision of a probation officer or of some other person, named by the court" shall be substituted.

(2) After the sub-section as so renumbered, the following sub-sections shall be added, namely:—

"(2) Where a court passes an order under this section placing a youthful offender under the supervision of a probation officer or of some other person, such officer or person shall, while the order remains in force, visit, advise and befriend the youthful offender and when necessary, endeavour to find him suitable employment.

(3) The parent, guardian, relative or other person to whose custody a youthful offender has been committed, or the probation officer or other person under whose supervision a youthful offender has been placed, may, at any time while the order committing him to such custody or placing him under such supervision remains in force and while the offender is under the age of sixteen years, bring him before the court which passed the order or any other court within the local limits of whose jurisdiction the youthful offender may then be residing, and such court may, if it thinks that it is desirable in the interests of the youthful offender so to do, vary the order or orders previously passed and

order him to be sent to a certified school or pass a fresh order or orders under sub-section (1)".

Amendment of section 28, Madras Act IV of 1920.

3. In section 28 of the said Act, clauses (*d*) to (*j*) shall be relettered as clauses (*e*) to (*k*) respectively, and after clause (*c*), the following clause shall be inserted, namely:—

"(*d*) by committing the offender to the custody of any suitable person, whether a relative or not, who is willing to undertake the care of the offender; or".

Amendment of section 29, Madras Act IV of 1920.

4. (1) In clause (*d*) of sub-section (1) of section 29 of the said Act, after the words "reputed thief," the following word and clause shall be inserted, namely:—

"or

(*e*) is living in a house used for an immoral purpose or in any other circumstances calculated to cause, encourage or favour the seduction or prostitution of the child;".

(2) To sub-section (3) of section 29 of the said Act, the following proviso shall be added, namely:—

"Provided that a girl coming within the description mentioned in clause (*e*) of sub-section (1) may be committed to such custody until she attains the age of eighteen years, or for any shorter period."

Amendment of section 30, Madras Act IV of 1920.

5. (1) In section 30 of the said Act—

(i) after the word "child" wherever it occurs, the words "or young person" shall be inserted;

(ii) the word "junior" before the words "certified school" shall be omitted; and

(iii) for the words "order him to be sent to any such school," the words "order the child or young person to be sent to a junior or senior certified school, as the case may be" shall be substituted.

(2) To the same section, the following *Explanation* shall be added, namely:—

"*Explanation.*—Where any young person is ordered to be sent to a certified school under this section, the provisions of this Act shall, so far as may be, apply to him as if he were a youthful offender."

THE MADRAS VILLAGE COURTS (AMENDMENT) ACT, 1936.

ACT NO. II OF 1937.

[*31st December*, 1936 *and 28th January*, 1937.

An Act further to amend the Madras Village Courts Act, 1888, *for certain purposes.*

WHEREAS it is expedient further to amend the Madras Village Courts Act, 1888, for the purposes hereinafter appearing;

AND WHEREAS the previous sanction of the Governor-General has been obtained to the passing of this Act;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS VILLAGE COURTS (AMENDMENT) ACT, 1936.

Amendment of section 5, Madras Act I of 1889.

2. In section 5 of the Madras Village Courts Act, 1888 (hereinafter referred to as the said Act)—

(i) in the definition of 'Village munsif', for the words and figures 'and except in sections 7 and 16 includes the president of a panchayat court' the following shall be substituted, namely:—

"and except in sub-section (1) of section 16 includes—

(*a*) the president of a panchayat court; and

(*b*) the vice-president of a panchayat court, exercising the functions of its president under this Act or the rules made thereunder"; and

(ii) after the definition of 'District Munsif' the following definition shall be inserted, namely:—

"Moveable property."

" 'Movable property' includes growing crops as well as ungathered products of land."

Amendment of section 9, Madras Act II of 1889.

3. For sub-section (5) of section 9 of the said Act, the following sub-section shall be substituted, namely:—

"(5) (*a*) A panchayat court shall elect, according to the rules prescribed in that behalf, one of its members to be its president and another member to be its vice-president.

(*b*) The president may, by order in writing, delegate any of his functions to the vice-president:

Provided that he shall not delegate any functions which the panchayat court expressly forbids him to delegate.

(*c*) If the president is absent from the jurisdiction of the court or is incapacitated, his functions shall devolve on the vice-president.

(*d*) When the office of president is vacant, the vice-president shall exercise the functions of the president until a new president assumes office.

(*e*) Every sitting of the court shall be presided over by the president, and in his absence, by the vice-president if there is one. If there is no vice-president, or in the absence of both the president and the vice-president, the members present and constituting the court shall elect from among themselves a president for the purposes of that sitting."

Insertion of new sections 9-A and 9-B in Madras Act I of 1889.

4. After section 9 of the said Act, the following sections shall be inserted, namely:—

Transfer of suits and civil proceedings.

"9-A. Where a village Court is established under any of the provisions of section 6 or sub-section (1) of section 9 in any local area, in lieu of a village Court or Courts having jurisdiction over such area—

(*a*) all suits or civil proceedings pending in such Court or Courts shall be deemed to have been instituted or taken in the Court newly established for such area; and

(*b*) all decrees passed by such Court or Courts which have not been executed or are under execution shall be deemed to have been passed by the Court so established.

Transfer of criminal cases and proceedings.

9-B. The provisions of section 9-A shall, so far as may be, apply to criminal cases or proceedings pending before a panchayat Court or Courts in lieu of which a panchayat Court is newly established."

Amendment of section 13, Madras Act I of 1889.

5. In section 13 of the said Act, for the words 'personal property' the words 'movable property' shall be substituted.

Insertion of new section 53-A in Madras Act I of 1889.

6. After section 53 of the said Act, the following section shall be inserted, namely:—

Mode of dealing with crops or ungathered products after attachment.

"53-A. Where the crops or ungathered products of any land are attached under section 53, the village Court may cause them to be sold when fit for reaping or gathering, or at its option, may cause them to be reaped or gathered in due season and stored in proper places until sold. In the latter case, the expense of reaping or gathering and storing such crops or products shall be defrayed by the judgment-debtor when he redeems the property or from the proceeds of the sale in the event of its being sold."

Amendment of section 76, Madras Act I of 1889.

7. In section 76 of the said Act—

(i) for the first paragraph of sub-section (2), the following shall be substituted, namely:—

"(2) If a panchayat Court finds an accused person guilty of any of the above offences, it may impose on him—

(*a*) a fine not exceeding ten rupees in respect of an offence under section 510 of the Indian Penal Code, and

(*b*) a fine not exceeding fifteen rupees in respect of any of the other offences:"; and

(ii) sub-section (7) shall be lettered as clause (*a*) of sub-section (7) and after the clause as so lettered, the following clause shall be added, namely:—

"(*b*) Where however a panchayat Court is disestablished and no new panchayat Court is constituted in lieu thereof, the District or Sub-divisional Magistrate shall transfer all criminal cases and proceedings before such Court to his own Court or to the Court of any Magistrate subordinate to himself or to any panchayat Court within his jurisdiction."

Amendment of section 77, Madras Act I of 1889.

8. In sub-section (1) of section 77 of the said Act, for the word and figures 'section 403', the words, figures and letters 'sections 403, 476, 476-A and 476-B' shall be substituted.

Amendment of section 78, Madras Act I of 1889.

9. In clause (*b*) of sub-section (2) of section 78 of the said Act, after the word 'presidents', the word 'vice-presidents' shall be inserted.

THE MADRAS PROBATION OF OFFENDERS ACT, 1936.

ACT NO. III OF 1937.

[31*st December*, 1936 *and* 28*th January*, 1937.

An Act to provide for the release on probation of first offenders.

WHEREAS it is expedient to provide for the release on probation of first offenders in certain cases and for other matters incidental thereto;

AND WHEREAS the previous sanction of the Governor-General has been obtained to the passing of this Act;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE MADRAS PROBATION OF OFFENDERS ACT, 1936.

(2) It extends to the whole of the Presidency of Madras.

(3) (*a*) This section shall come into force at once.

(*b*) The [1][Provincial Government] may, by notification in the [2][Official Gazette], direct that all or any of the remaining provisions of this Act shall

[1] These words were substituted for the words "Local Government" by paragraph 4 (1) of the Government of India (Adaptation of Indian Laws) Order, 1937.

[2] These words were substituted for the words "*Fort St. George Gazette*" by *ibid.*

come into force in any local area on such date as may be specified in such notification.

Interpretation.

2. In this Act, unless there is anything repugnant is the subject or context—

(*a*) the "Code" means the Code of Criminal Procedure, 1898; and

(*b*) expressions used but not defined in this Act and defined in the Code have the meanings assigned to them in the Code.

Power of Court to release certain offenders after admonition.

3. In any case in which a person is found guilty of the offence of theft, dishonest misappropriation, or cheating punishable under the Indian Penal Code or of any offence punishable with not more than two years imprisonment and no previous conviction is proved against him, the Court by which he is found guilty may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

Power of Court to release certain offenders on probation of good conduct.

4. (1) When any person not under twenty-one years of age is found guilty of an offence punishable with imprisonment for not more than seven years, or when any person under twenty-one years of age or any woman is found guilty of an offence not punishable with death or transportation for life, and no previous conviction is proved against the offender, if it appears to the Court by which he is found guilty, regard being had to the age, character, antecedents or physical or mental condition of the offender and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period not exceeding three years as the Court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the Court shall not direct the release of an offender under this section, unless it is satisfied that the offender or one of his sureties (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(2) Where the offender referred to in sub-section (1) is under twenty-four years of age, the Court may make a supervision order directing that such offender shall be under the supervision of such probation officer as may be named in the order during the period specified therein and imposing such other conditions for securing such supervision as may be specified in the order:

Provided that the period so specified shall not extend beyond the date on which, in the opinion of the Court, the offender will attain the age of twenty-five years.

(3) A Court making a supervision order under sub-section (2) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants and any other matters as the Court may, having regard to the particular circumstances of the case, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(4) A Court making a supervision order shall furnish to the offender and the sureties, if any, a notice in writing stating in simple terms the conditions of the bond.

Procedure in cases submitted by Magistrates not empowered to act under sections 3 and 4.

5. Notwithstanding anything contained in sections 3 and 4, where any first offender is found guilty of an offence by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the [1][Provincial Government] in this behalf, and the Magistrate is of opinion that the powers conferred by the said sections should be exercised, he shall record his opinion to that effect and submit the proceedings to a Magistrate of the first class or Subdivisional Magistrate, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

Powers of Appellate Courts.

6. An order under section 3 or section 4 may be made by an Appellate Court.

Procedure in case of offender failing to observe conditions of release.

7. (1) If the Court before which the offender is bound by his bond under section 4 to appear for sentence when called upon, or any Court which could have dealt with the offender in respect of his original offence, has reason to believe that the offender has failed to observe any of the conditions of the bond or bonds executed by him, it may issue a warrant for his apprehension, or may, if it thinks fit, issue a summons to the offender and his sureties, if any, requiring him or them to attend before it at such time as may be specified in the summons.

(2) The Court before which an offender is so brought or appears may either remand him to custody until the case is concluded, or admit him to bail, with or without sureties, to appear on the date of hearing.

(3) If the Court, after hearing the case is satisfied that the offender has failed to observe any of the conditions of the bond or bonds executed by him, it may forthwith,—

(*a*) sentence him for the original offence, or

(*b*) without prejudice to the continuance in force of the bond or bonds, impose upon him, in respect of the first such failure, a penalty not exceeding the amount of fine which may be imposed for the original offence but in no case exceeding fifty rupees.

(4) If a penalty imposed under clause (*b*) of sub-section (3) is not paid within such period as the Court may fix, the Court may sentence the offender for the original offence.

Provision as to bonds.

8. The provision of sections 122, 126, 126-A, 406-A (*b*) and (*c*), 514, 514-A, 514-B and 515 of the Code, shall, so far as may be, apply in the case of sureties given under this Act.

Appointment of probation officers.

9. (1) A probation officer named in a supervision order may be—

(*a*) any person appointed to be a probation officer by the [1][Provincial Government], or

(*b*) any person provided for this purpose by a society recognized in this behalf by the [1][Provincial Government], or

(*c*) in any exceptional case, any other person who, in the opinion of the court, is a fit person to act as a probation officer in the special circumstances of the case,

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[1] These words were substituted for the words "Local Government" by paragraph 4 (1) of the Government of India (Adaptation of Indian Laws) Order, 1937.

Explanation.—A probation officer may be a person of either sex.

(2) In naming a probation officer in a supervision order, the court shall be guided by any general or special instructions the [1][Provincial Government] may issue in this behalf.

(3) A probation officer, in the exercise of his duties under any supervision order, shall be subject to the control of the District Magistrate of the district in which the offender for the time being resides.

(4) The court before which an offender is bound by his bond to appear for sentence when called upon, or the District Magistrate of the district in which the offender for the time being resides, may at any time appoint another probation officer in the place of the person named in a supervision order.

Explanation.—For the purposes of this section, the presidency-town shall be deemed to be a district and the Chief Presidency Magistrate shall be deemed to be the District Magistrate of that district.

Duties of probation officers.

10. A probation officer, shall, subject to rules made under this Act and to the direction of the court—

(*a*) visit or receive visits from the offender at such reasonable intervals as may be specified in the supervision order, or subject thereto, as the probation officer may think fit;

(*b*) see that he observes the conditions of the bond or bonds executed by him;

(*c*) report to the court as to his behaviour; and

(*d*) advise, assist and befriend him, and when necessary, endevour to find suitable employment for him.

Variation of conditions of probation and discharge of bonds executed by offender.

11. The court before which any offender is bound by his bond under section 4 to appear for sentence when called upon—

(*a*) may at any time if it appears, upon the application of the probation officer, that it is expedient that the bond or bonds executed by the offender should be varied, summon him, and if he fails to show cause why such variation should not be made, vary the bond or bonds by extending or diminishing the duration thereof (so, however, that it shall not exceed three years from the date of the original order and shall not extend beyond the date on which, in the opinion of the court, the offender shall attain the age of twenty-five years), or by altering the conditions thereof or by inserting additional conditions therein, or

(*b*) may, on application made by the probation officer and on being satisfied that the conduct of the offender has been such as to make it unnecessary that he should be kept any longer under supervision, discharge the bond or bonds executed by him.

Effect of variation of bond on sureties.

12. (1) When any condition in a bond is relaxed under the provisions of section 11, the condition as so relaxed and not the original condition shall be binding the sureties to the bond.

(2) Where any condition in a bond is made more onerous under the provisions of section 11, such condition shall not be binding in the more onerous form on any surety to the bond, unless he has accepted it in writing, but the condition in its original form shall continue to bind any surety who has not accepted the condition in its more onerous form.

(3) Where any additional condition is imposed under the provisions of section 11, such additional condition shall not be binding on any surety to the bond unless he has accepted it in writing.

[1]These words were substituted for the words "Local Government" by paragraph 4 (1) of the Government of India (Adaptation of Indian Laws) Order, 1937.

(4) No variation in, or addition to, the conditions of any bond made under the provisions of section 11, shall affect the liability of any surety to the bond in respect of any condition which has not been varied.

Power of Provincial Government to make rules.

13. (1) The [1][Provincial Government] may, either generally or specially for any area or areas in which this Act is in force, make rules consistent with this Act for carrying out all or any of the purposes thereof.

(2) In particular and without prejudice to the generality of the forgoing power, such rules may provide for or regulate—

(*a*) any matters incidental to the appointment, resignation and removal of probation officers;

(*b*) the payment of remuneration and expenses to probation officers appointed by the [1][Provincial Government] direct, or of a subsidy to any society which provides persons for appointment as probation officers; and

(*c*) the conditions on which societies may be recognized for the purposes of clause (*b*) of sub-section (1) of section 9.

(3) All rules made under this section shall be subject to the condition of previous publication.

Saving of the operation of certain enactments.

14. Nothing in this Act shall affect the provisions of section 31 of the Reformatory Schools Act, 1897, or the Madras Children Act, 1920, or the Madras Borstal Schools Act, 1925.

Saving of the jurisdiction of the High Court.

15. Nothing in this Act shall be deemed in any way to affect or derogate from the jurisdiction of the High Court.

THE MADRAS GENERAL CLAUSES (AMENDMENT) ACT, 1936.

ACT No. IV OF 1937.

[31*st December*, 1936 *and* 1*st February*, 1937.

An Act further to amend the Madras General Clauses Act, 1891, *for a certain purpose.*

WHEREAS it is expedient further to amend the Madras General Clauses Act, 1891, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS GENERAL CLAUSES (AMENDMENT) ACT, 1936.

Insertion of new section 8-A in Modras Act I of 1891.

2. After section 8 of the Madras General Clauses Act, 1891, the following section shall be inserted, namely:—

Effect of repeal of Act making textual amendment in previous Act.

"8-A. Where any Act to which this Chapter applies, repeals any enactment by which the text of any previous enactment was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal."

[1]These words were substituted for the words "Local Government" by paragraph 4 (1) of the Government of India (Adaptation of Indian Laws) Order, 1937.

THE MADRAS CO-OPERATIVE SOCIETIES (AMENDMENT) ACT, 1936.

ACT No. V OF 1937.

[*22nd January,* 1937; *6th February,* 1937.

An Act further to amend the Madras Co-operative Societies Act, 1932, *for certain purposes.*

WHEREAS it is expedient further to amend the Madras Co-operative Societies Act, 1932, for the purposes hereinafter appearing;

AND WHEREAS the previous sanction of the Governor-General has been obtained to the passing of this Act;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS CO-OPERATIVE SOCIETIES (AMENDMENT) ACT, 1936.

Section 6 to have retrospective effect.

2. The amendment made by section 6 shall be deemed to have been made, and to have come into force, on the first day of August, 1933.

Amendment of Section 3, Madras Act VI of 1932.

3. In section 3 of the Madras Co-operative Societies Act, 1932 (hereinafter referred to as the said Act), the words "and may appoint persons to assist such Registrar" shall be omitted and for the words "on any such persons", the words "on any other persons" shall be substituted.

Amendment of section 51, Madras Act VI of 1932.

4. For clause (*c*) of sub-section (1) of section 51 of the said Act, the following clause shall be substituted, namely:—

"(*c*) between the society or its committee and any past committee, any officer, agent or servant, or any past officer, past agent or past servant, or the nominee, heirs or legal representatives of any deceased officer, deceased agent or deceased servant, of the society, or".

Amendment of section 57-A, Madras Act VI of 1932.

5. In the last paragraph of section 57-A of the said Act, after the words "by the attachment and sale", the words "or by the sale without attachment" shall be inserted.

Insertion of new section 57-B in Madras Act VI of 1932.

6. After section 57-A of the said Act, the following section shall be inserted, namely:—

Registrar or person empowered by him to be a Civil Court for certain purposes.

"57-B. The Registrar or any person empowered by him in that behalf, shall be deemed, when exercising any powers under this Act for the recovery of any amount by the attachment and sale or by the sale without attachment of any property, or when passing any orders on any application made to him for such recovery or to take some step-in-aid of such recovery, to be a Civil Court for the purposes of Article 182 of the First Schedule to the Indian Limitation Act, 1908."

THE MADRAS REPEALING ACT, 1936.

ACT No. VI OF 1937.

[*31st December,* 1936; *9th February,* 1937.

An Act to repeal certain enactments.

WHEREAS it is expedient that the enactments specified in the Schedule, which are spent or have otherwise become unnecessary, or have ceased to be in-

force otherwise than by expressed specific repeal, should be expressly and specifically repealed; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS REPEALING ACT, 1936.

Repeal of certain enactments.

2. The enactments specified in the Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

Savings.

3. The repeal by this Act of any enactment shall not affect any Act or Regulation in which such enactment has been applied, incorporated or referred to; and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered, or any right, title, obligation, or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing; nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office, or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognized or derived by, in or from any enactment hereby repealed;

nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force.

THE SCHEDULE.

Year. (1)	Number. (2)	Short title or subject. (3)	Extent of repeal. (4)
		Act of the Governor-General in Council.	
1885	XXI	The Madras Civil Courts Act, 1885 ..	Section 3.
		Acts of the Governor of Fort St. George in Council.	
1896	I	The Madras Rent Recovery (Amendment) Act, 1896.	The whole.
1900	IV	The Madras Proprietary Estates and Survey (Amendment) Act, 1900.	The whole.
1904	IV	The Madras Village Panchayats' Regulation and the Madras Village Courts (Amendment) Act, 1904.	The whole.
1909	IV	The Madras Estates Land (Amendment) Act, 1909.	The whole except sections 1 and 9.
1916	II	The Madras Irrigation Cess (Amendment) Act, 1916.	The whole.
1919	VI	The Madras Civil Courts (Amendment) Act, 1919.	The whole.
1920	VI	The Madras Irrigation Cess (Amendment) Act, 1920.	The whole.
1920	XII	The Madras District Municipalities (Amendment) Act, 1920.	The whole.
		Acts of the Madras Legislature.	
1921	II	The Madras District Municipalities (Amendmert) Act, 1921.	The whole.
1921	V	The Madras District Municipalities (Amendment) Act, 1921.	The whole.
1922	I	The Madras District Municipalities (Amendment) Act, 1921.	The whole.
1922	VII	The Madras City Municipal (Amendment) Act, 1922.	Sections 2 and 3.
1923	I	The Malabar (Completion of Trials) Act, 1922.	The whole.

Year. (1)	Number. (2)	Short title or subject. (3)	Extent of repeal. (4)
1924	IV	The Madras City Municipal (Amendment) Act, 1924.	Section 3.
1925	V	The Madras Local Boards (Amendment) Act, 1924.	The whole.
1927	VI	The Madras Planters Labour (Repealing) Act, 1927.	The whole.
1928	II	The Madras Prevention of Adulteration (Amendment) Act, 1927.	Section 4.
1929	XIV	The Madras Medical Registration (Second Amendment) Act, 1929.	Clause (i) of section 2.
1931	VII	The Madras Panchayats (Repealing) Act, 1931.	The whole.
1935	XIV	The Madras City Municipal (Amendment) Act, 1935.	The whole.

THE MADRAS STATE AID TO INDUSTRIES (AMENDMENT) ACT, 1936.

ACT No VII OF 1937.

[*6th January*, 1937; *9th February*, 1937.

An Act further to amend the Madras State Aid to Industries Act, 1922, for certain purposes.

WHEREAS it is expedient further to amend the Madras State Aid to Industries Act, 1922, for the purposes hereinafter appearing;

AND WHEREAS the previous sanction of the Governor-General has been obtained to the passing of this Act;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS STATE AID TO INDUSTRIES (AMENDMENT) ACT, 1936.

Amendment of section 5, Madras Act V of 1923.

2. In section 5 of the Madras State Aid to Industries Act, 1922 (hereinafter referred to as the said Act)—

(i) after clause (*c*) of sub-section (1), the following shall be added, namely:—

", or

(*d*) old or established industries:

Provided that aid shall not be given to any old or established industry unless the Local Government are satisfied that special reasons exist for giving such aid"; and

(ii) in sub-section (3), after the word "final" the words "and shall not be called in question in any Court of law" shall be added.

Amendment of section 9, Madras Act V of 1923.

3. In section 9 of the said Act—

(i) for the words "net value of the assets of the industrial business or enterprise after deducting existing encumbrances", the words "net value of the assets of the industrial business or enterprise and of any other property offered as collateral security for the loan, after deducting in both cases existing encumbrances" shall be substituted; and

(ii) the proviso shall be omitted.

Amendment of section 14-A, Madras Act V of 1923.

4. In section 14-A of the said Act, for the words "one thousand rupees", the words "two thousand rupees" shall be substituted.

Amendment of section 19, Madras Act V of 1923.

5. At the end of clause (6) of sub-section (*b*) of section 19 of the said Act, the following words shall be added, namely:—

"or of any property offered as collateral security for a loan".

THE USURIOUS LOANS (MADRAS AMENDMENT) ACT, 1936.

ACT No. VIII OF 1937.

[*31st December, 1936; 5th February, 1937.*

An Act to amend the Usurious Loans Act, 1918, in its application to the Presidency of Madras, for certain purposes.

WHEREAS it is expedient to amend the Usurious Loans Act, 1918, in its application to the Presidency of Madras, for the purposes hereinafter appearing;

AND WHEREAS the previous sanction of the Governor-General has been obtained to the passing of this Act;

It is hereby enacted as follows:—

Short title, extent and application.

1. (1) This Act may be called THE USURIOUS LOANS (MADRAS AMENDMENT) ACT, 1936.

(2) It extends to the whole of the Presidency of Madras.

(3) The provisions of this Act shall apply to all suits to which the Usurious Loans Act, 1918 (hereinafter referred to as the said Act), would apply and which are pending on, or are instituted on or after, the date of the commencement of this Act.

Amendment of section 3, Act X of 1918.

2. In section 3 of the said Act—

(i) in sub-section (1), for the words, letters and brackets beginning with "has reason to believe" and ending with "any of the following powers, namely, may," the following shall be substituted, namely:—

"has reason to believe that the transaction was, as between the parties thereto, substantially unfair, the Court shall exercise one or more of the following powers, namely,—";

(ii) the *Explanation* to the same sub-section shall be renumbered as *Explanation II* and the following shall be inserted as *Explanation I*, namely:—

"*Explanation I.*—If the interest is excessive, the Court shall presume that the transaction was substantially unfair; but such presumption may be rebutted by proof of special circumstances justifying the rate of interest";

(iii) to clause (*b*) of sub-section (2), the following proviso shall be added, namely:—

"Provided that in the case of loans to agriculturists, if compound interest is charged, the Court shall presume that the interest is excessive"; and

(iv) the *Explanation* to clause (*d*) of the same sub-section shall be omitted.

THE MADRAS PAYMENT OF SALARIES AND REMOVAL OF DISQUALIFICATIONS ACT, 1937.

ACT No. IX OF 1937.

[*17th September, 1937.*

An Act to provide for the salaries and allowances of Ministers, the Speaker and Deputy Speaker, the President and Deputy President, Parliamentary Secretaries, and members of the Madras Legislature and for the removal of certain disqualifications.

WHEREAS it is expedient to provide by an Act of the Legislature for the salaries and allowances of Ministers, of the Speaker and the Deputy Speaker of the Legislative Assembly, of the President and the Deputy President of the Legislative Council, of Parliamentary Secretaries, and of members of the Legislative Assembly and of the Legislative Council:

AND WHEREAS it is necessary to remove the disqualification imposed on Parliamentary Secretaries for being chosen as, and for being, members of the Legislative Assembly or Legislative Council:

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE MADRAS PAYMENT OF SALARIES AND REMOVAL OF DISQUALIFICATION ACT, 1937.

(2) This section and sections 5, 6, 8 and 9 and the provisions of sections 7, 10 and 11 in so far as they relate to sections 5, 6, 8 and 9 shall be deemed to have come into force on the 1st day of August, 1937.

Salaries of Ministers.

2. There shall be paid to the Prime Minister and to each of the other Ministers who are members of the Governor's Council of Ministers, a salary of rupees five hundred per mensem, a house-rent allowance of rupees one hundred per mensem and a conveyance allowance of rupees one hundred and fifty per mensem.

Salaries of the Speaker and Deputy Speaker of the Legislative Assembly.

3. (1) There shall be paid to the Speaker of the Legislative Assembly a salary of rupees five hundred per mensem, a house-rent allowance of rupees one hundred per mensem and a conveyance allowance of rupees one hundred and fifty per mensem.

(2) There shall be paid to the Deputy Speaker of the Legislative Assembly a salary of rupees one hundred and fifty per mensem.

Salaries of the President and Deputy President of the Legislative Council.

4. (1) There shall be paid to the President of the Legislative Council a salary of rupees two hundred and fifty per mensem, a house-rent allowance of rupees one hundred per mensem and a conveyance allowance of rupees one hundred and fifty per mensem.

(2) There shall be paid to the Deputy President of the Legislative Council a salary of rupees one hundred and fifty per mensem.

Salaries of Parliamentary Secretaries.

5. There shall be paid to every Parliamentary Secretary a salary of rupees two hundred and fifty per mensem and a consolidated house-rent and conveyance allowance or rupees one hundred and fifty per mensem.

Conveyances for the Ministers and the Speaker.

6. The Provincial Government may from time to time purchase and provide suitable conveyances for the use of the Ministers and the Speaker, subject to such rules as regards their maintenance and repair as may be made by the Provincial Government.

Travelling allowances of Ministers, etc.

7. The holders of the offices referred to in sections 2 to 5 shall be entitled, while touring on public business, to travelling and daily allowances at such rates and upon such conditions as may be determined by the Provincial Government.

Removal of disqualification of Parliamentary Secretaries.

8. No person shall be disqualified for being chosen as, or for being a member of the Legislative Assembly or the Legislative Council, by reason only of the fact that he holds the office of Parliamentary Secretary and receives the emoluments in respect thereof.

Salaries and allowances of members of the Legislative Assembly and Legislative Council.

9. Every member of the Legislative Assembly or of the Legislative Council who does not hold any of the offices referred to in sections 2 to 5 shall be entitled to receive—

(*a*) a salary of rupees seventy-five per mensem, and

(*b*) travelling and daily allowances in accordance with such rules as may be made by the Provincial Government and until such rules are made, in accordance with the provisions which were applicable on the 31st March, 1937, to members of the Legislative Council of the Governor of Madras.

Relinquishment of salaries and allowances.

10. The whole or any portion of the salary or allowances to which any person is entitled under this Act may be relinquished by him in writing.

Saving.

11. Nothing in this Act shall prevent a retired Government servant from drawing his pension in addition to any salary or allowances to which he may be entitled under this Act.

THE MADRAS PROHIBITION ACT, 1937.

ACT No. X OF 1937.

[*1st October, 1937.*

An Act to introduce and extend the prohibition of the manufacture, sale and consumption of intoxicating liquors and drugs in the Province of Madras.

WHEREAS it is expedient as early as possible to bring about the prohibition, except for medicinal, scientific, industrial or such like purposes, of the production, manufacture, possession, export, import, transport, purchase, sale and consumption of intoxicating liquors and drugs in the Province of Madras;

AND WHEREAS it is desirable to give effect to the abovementioned policy by introducing it in certain selected areas in the said Province and utilising the experience gained therein for extending it to the other areas thereof;

It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE MADRAS PROHIBITION ACT, 1937.

(2) It extends to the whole of the Province of Madras.

(3) (*a*) This section and sections 3 and 6 shall come into force in the whole of the Province of Madras at once.

(*b*) The rest of this Act shall come into force—

(i) in the district of Salem, at once; and

(ii) in any other local area in the Province of Madras on such date as the Provincial Government may, by notification, appoint.

Repeals.

2. From the date on which the provisions of this Act other than sections 1, 3 and 6 come into force in any local area, the enactments mentioned in the Schedule shall cease to be in force in such area to the extent specified in the fourth column thereof.

Provided that the Provincial Government may, by notification, declare that the provisions of this Act other than sections 1, 3 and 6 shall cease to be in force in any local area on such dates as may be specified in the notification and thereupon the enactments mentioned in the Schedule with any subsequent statutory modifications thereof shall revive and come into force in such area with effect on and from such date.

Definitions.

3. In this Act, unless there is something repugnant in the subject or context—

'Bottle'.

(1) "bottle" means to transfer liquor from a cask or other vessel to a bottle, jar, flask or pot or similar receptacle for the purpose of sale whether any process of manufacture be employed or not and includes rebottling.

'Buy' or 'buying.'

(2) "buy" or "buying" includes any receipt including gift.

'Collector'.

(3) "Collector" means a Collector of land revenue, or any person appointed under clause (*b*) of section 25 to exercise all or any of the powers or to perform all or any of the duties of a Collector under this Act.

'Commissioner'.

(4) "Commissioner" means the officer appointed under clause (*a*) of section 25.

'Cultivation'.

(5) "cultivation" includes the tending or protecting of a plant during growth and does not necessarily imply raising it from seed.

'Export'.

(6) "export" means—

(*a*) to take out of any local area to which this Act applies to any other local area in the Province of Madras to which this Act has not been extended, or

(*b*) to take out of the Province of Madras otherwise than across a customs frontier as defined by the Central Government.

'Import'.

(7) "import" means—

(*a*) to bring into any local area to which this Act applies from any other local area in the Province of Madras to which this Act has not been extended, or

(*b*) to bring into the Province of Madras, otherwise than across a customs frontier as defined by the Central Government.

'Intoxicating drug'.

(8) "Intoxicating drug" means—

(i) the leaves, small stalks and flowering or fruiting tops of the Indian hemp plant (*Cannabis Sativa* L.) including all forms known as *bhang*, *siddhi*, or *ganja*;

(ii) *charas*, that is, the resin obtained from the Indian hemp plant, which has not been submitted to any manipulations other than those necessary for packing and transport;

(iii) any mixture, with or without neutral materials, of any of the above forms of intoxicating drug, or any drink prepared therefrom; and

(iv) any other intoxicating or narcotic substance which the Provincial Government may, by notification, declare to be an intoxicating drug, such substance not being opium, coca leaf, or a manufactured drug, as defined in section 2 of the Dangerous Drugs Act, 1930.

'Liquor.'

(9) "Liquor" includes toddy, spirits of wine, methylated spirits, spirits, wine, beer and all liquid consisting of or containing alcohol;

'Local body.'

(10) "Local body" means theCorporation of Madras, any municipality constituted under the Madras District Municipalities Act, 1920, or any local board constituted under the Madras Local Boards Act, 1920.

'Manufacture.'

(11) "manufacture" includes every process,whether natural of artificial, by which any fermented, spirituous, or intoxicating liquor or intoxicating drug is produced, prepared or blended, and also re-distillation and every process for the rectification of liquor;

'Place'. (12) "place" includes also a house, shed, enclosure, building, shop, tent and vessel;

'Police station'. (13) "police station" includes any place which the Provincial Government may, by notification, declare to be a police station for the purposes of this Act;

'Prohibition Officer'. (14) "Prohibition Officer" means the Commissioner, a Collector, or any officer or other person lawfully appointed or invested with powers under section 25;

'Rectification'. (15) "rectification" includes every process whereby spirits are purified or are coloured or flavoured by mixing any material therewith;

'Sale' or 'selling.' (16) "sale" or "selling" includes any transfer including gift;

'Spirits'. (17) "spirits" means any liquor containing alcohol and obtained by distillation (whether it is denatured or not);

Explanation.—"Denatured" means subjected to a process prescribed by the Provincial Government by notification for the purpose of rendering unfit for human consumption;

'Sweet toddy.' (18) "sweet toddy" means juice drawn into receptacles treated so as to prevent any fermentation:

'Toddy.' (19) "toddy" means the fermented or unfermented juice drawn from a coconut, palmyra, date, or any other kind of palm tree; and

'Transport.' (20) "transport" means to move from one place to another within any local area to which this Act applies.

CHAPTER II.

PROHIBITIONS AND PENALTIES.

'Prohibition of the manufature of, traffic in, and consumption of, liquors and intoxicating drugs.

4. (1) Whoever,

(*a*) imports, exports, transports or possesses liquor or any intoxicating drug; or

(*b*) manufactures liquor or any intoxicating drug; or

(*c*) except in accordance with the rules made by the Provincial Government in that behalf cultivates the hemp plant (*Cannabis sativa*); or collects any portion of such plant from which an intoxicating drug can be manufactured; or

(*d*) taps any toddy-producing tree or permits or suffers to be tapped any toddy-producing tree belonging to him or in his possession; or

(*e*) draws toddy from any tree or permits or suffers toddy to be drawn from any tree belonging to him or in his possession; or

(*f*) constructs or works any distillery or brewery; or

(*g*) uses, keeps or has in his possession any materials, still, utensil, implement or apparatus whatsoever for the tapping of toddy or the manufacture of liquor or any intoxicating drug; or

(*h*) bottles any liquor for purposes of sale; or

(*i*) sells liquor or any intoxicating drug; or

(*j*) consumes or buys liquor or any intoxicating drug; or

(*k*) allows any of the acts aforesaid upon premises in his immediate possession shall be punished with imprisonment which may extend to six months or with fine which may extend to one thousand rupees, or with both:

Provided that nothing contained in this sub-section shall apply to any act done under, and in accordance with, the provisions of this Act or the terms of any rule, notification, order, licence or permit issued thereunder.

(2) It shall be presumed until the contrary is shown—

(*a*) that a person accused of any offence under clauses (*a*) to (*j*) of sub-section (1) has committed such offence in respect of any liquor or intoxicating drug or any still, utensil, implement or apparatus whatsoever for the tapping of toddy or the manufacture or liquor or any intoxicating drug, or any such materials as are ordinarily used in the tapping of toddy or the manufacture of liquor or any intoxicating drug, for the possession of which he is unable to account satisfactorily; and

(*b*) that a person accused of any offence under clause (*k*) of sub-section (1) has committed such offence if an offence is proved to have been committed in premises in his immediate possession in respect of any liquor or intoxicating drug or any still, utensil, implement or apparatus whatsoever for the tapping of toddy or the manufacture of liquor or any intoxicating drug, or any such materials as are ordinarily used in the tapping of toddy or the manufacture of liquor or any intoxicating drug.

Punishment for rendering or attempting to render denatured spirits fit for human consumption.

5. Whoever renders or attempts to render fit for human consumption any spirit whether manufactured in British India or not, which has been denatured or has, in his possession, any spirit in respect of which he knows or has reason to believe that any such attempt has been made shall be punished with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both.

For the purpose of this section it shall be presumed, until the contrary is proved that any spirit which is proved on chemical analysis to contain any quantity of any of the prescribed denaturants is or contains or has been derived from denatured spirit.

Prohibition of advertisement.

6. Whoever prints or publishes in any newspaper, book, leaflet, booklet, or any other single or periodical publication or otherwise displays or distributes any advertisement or other matter commending, soliciting the use of, or offering any liquor or intoxicating drug other than liquor or drugs exempted under section 16, or specially approved as of medicinal value by the Medical Council established by the Madras Medical Registration Act, 1914, shall be punished with fine which may extend to one thousand rupees:

Provided that this section shall not apply—

(*a*) to plain catalogues and price lists which may be generally or specially approved by the Commissioner; or

(*b*) to the normal circulation within the Province of newspapers, periodicals and books printed and published in accordance with law outside the Province; or

(*c*) to any advertisement contained in a newspaper printed and published in the Province before the first day of January, 1938.

Punishment for conspiracy.

7. When two or more persons agree—

(*a*) to commit or cause to be committed any offence under sub-section (1) of section 4 or under section 5, or

(*b*) to evade or nullify the provisions of this Act in any area where it is in force, each of such persons shall, notwithstanding that no act except the agreement was done by any of the parties thereto in pursuance thereof or that the agreement was made or the operations thereunder took place in an area to which this Act has not been extended, be punished with imprisonment which

may extend to three years or with fine which may extend to five thousand rupees or with both.

Punishment for vexatious search or arrest.

8. Any officer or person exercising powers under this Act, who—

(*a*) without reasonable ground of suspicion enters or searches or causes to be searched, any closed place; or

(*b*) vexatiously and unnecessarily seizes the property of any person on the pretence of seizing or searching for anything liable to confiscation under this Act; or

(*c*) vexatiously and unnecessarily detains, searches or arrests any person; or

(*d*) maliciously and falsely lays information leading to a search, seizure, detention or arrest; or

(*e*) in any other way maliciously exceeds his lawful powers,

shall be punished with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Punishment for vexatious delay.

9. Any officer or person exercising powers under this Act, who vexatiously and unnecessarily delays forwarding to a Prohibition Officer or to the officer in charge of the nearest police station as required by section 38, any person arrested or any article seized under this Act, shall be punished with fine which may extend to two hundred rupees.

Punishment for abetment of escape of persons arrested, etc.

10. Any officer or person exercising powers under this Act who—

(*a*) unlawfully releases or abets the escape of any person arrested under this Act, or abets the commission of any offence against this Act, or

(*b*) acts in any manner inconsistent with his duty for the purpose of enabling any person to do anything whereby any of the provisions of this Act may be evaded or broken and

any other officer of the Provincial Government or of a local body who abets the commission of any offence against this Act,

shall be punished with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Punishment for offences not otherwise provided for.

11. Whoever is guilty of any wilful act or intentional omission in contravention of any of the provisions of this Act, or of any rule, notification or order made thereunder and not otherwise provided for in this Act, shall be punished with fine which may extend to two hundred rupees.

Punishment for abetment of offence against Act in area to which Act is not extended.

12. Where any offence against this Act is committed in any area to which it has been extended, whoever commits, or attempts to commit, or abets the commission of, any of the acts making up the offence shall be liable to be punished therefor, whether such commission, attempt or abetment takes place within or outside such area.

Things liable to confiscation.

13. In any case in which an offence has been committed against this Act, the liquor, drug, materials, still, utensil, implement, or apparatus in respect or by means of which the offence has been committed shall be liable to confiscation along with the receptacles, packages, coverings, animals, vessels, carts, or other vehicles used to hold or carry the same.

Confiscation how ordered.

14. (1) When the offender is convicted or when the person charged with an offence against this Act is acquitted, but the Court decides that anything is liable to confiscation, such confiscation may be ordered by the Court.

(2) When an offence against this Act has been committed but the offender is not known, or cannot be found, or when anything liable to confiscation under this Act and not in the possession of any person cannot be satisfactorily accounted for, the case shall be inquired into and determined by the Collector or other Prohibition Officer in charge of the district or by any other officer authorized by the Provincial Government in that behalf, who may order such confiscation:

Provided that no such order shall be made until the expiration of fifteen days from the date of seizing the things intended to be confiscated or without hearing the persons, if any, claiming any right thereto, and evidence, if any, which they produce in support of their claims.

Offences under Act to be cognizable.

15. All offences under this Act shall be cognizable and the provisions of the Code of Criminal Procedure, 1898, with respect to cognizable offences shall apply to them.

CHAPTER III.

EXEMPTIONS AND LICENCES.

Power to notify exemptions.

16. (1) The Provincial Government may, by notification and subject to such conditions as they think fit, exempt any specified liquor or intoxicating drug, or article containing such liquor or drug from the observance of all or any of the provisions of this Act on the ground that such liquor, drug or article is required for a medicinal, scientific, industrial or such like purpose.

(1) When issuing a notification under sub-section (1), the Provincial Government shall have power to provide that a breach of any of the conditions subject to which the exemption is notified shall be punished with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both.

Exemption of *bona fide* travellers and lawful consignments.

17. Until the Provincial Government by notification otherwise direct, the provisions of this Act shall not be deemed to apply—

(*a*) to liquor in the possession of *bona fide* travellers for their own personal use while passing through any local area in which this Act is in force; or

(*b*) to lawful consignments of liquor or intoxicating drugs carried by a railway administration through or into any such local area.

Licences for *bona fide* medicinal or other purposes.

18. The Provincial Government or subject to the control of the Provincial Government, the Collector may issue licences to any person or in respect of any institution whether under the management of Government or not for the manufacture, export, import, transport, sale or possession of any liquor, intoxicating drug or article containing such liquor or drug, on the ground that such liquor, drug or article is required by such person or in respect of such institution for a *bona fide* medicinal, scientific, industrial or such like purpose.

Licences for tapping for sweet toddy, etc.

19. Subject to the control of the Provincial Government, the Collector or any officer empowered by him may issue—

(*a*) licences for the tapping of any trees for sweet toddy for consumption thereof without fermentation or for the manufacture of jaggery therefrom, or

(*b*) permits for the possession, transport or sale of such toddy.

Permits and licences.

20. The Provincial Government or any officer empowered by them in this behalf may issue—

(*a*) permits authorizing any person to consume and possess for personal consumption any liquor or intoxicating drug;

(*b*) permits authorizing any person or institution to possess and use any liquor for any religious purpose in accordance with ancient custom;

(*c*) licences to any institution to possess liquor and issue it to such of its members as hold permits under clause (*a*); and

(*d*) licences to any person in charge of a restaurant car attached to a railway train to possess liquor and serve it to *bona fide* passengers travelling by the train.

Form and conditions of licences and permits.

21. Every licence or permit granted under section 18, 19 or 20 shall—

(1) be granted on payment of such fees, if any, for such period, and subject to such restrictions and limitations and on such conditions: and

(2) be in such form and contain such particulars as the Provincial Government may direct either generally or in any particular case.

Counterpart agreement to be executed by licencees.

22. Every person taking out any licence or permit under section 18, 19 or 20 may be required to execute a counterpart agreement in conformity with the tenor of his licence or permit, and to give such security for the performance of his agreement as the Collector may require.

Power to cancel or suspend licences and permits.

23. (1) The Collector may cancel or suspend any such licence or permit—

(*a*) if any fee payable by the holder thereof be not duly paid; or

(*b*) in the event of any breach by the holder or such licence or permit or by his servants or by any one acting with his express or implied permission on his behalf, of any of the terms or conditions of such licence or permit; or

(*c*) if the holder thereof is convicted of any offence against this Act, or of any cognizable and non-bailable offence; or

(*d*) if the conditions of such licence or permit provide for its cancellation or suspension at will; or

(*e*) if the purpose for which the licence or permit is granted ceases to exist.

(2) The Provincial Government may cancel or suspend any such licence or permit without assigning the aforesaid or any other reasons.

Penalty for breach of the conditions of licences and permits.

24. In the event of any breach by the holder of such licence or permit or by his servants or by any one acting with his express or implied permission on his behalf, of any of the terms or conditions of such licence or permit, such holder shall, in addition to the cancellation or suspension of the licence or permit granted to him, be punished with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both, unless he shall establish that all due and reasonable precautions were exercised by him to prevent any such breach.

Any person who commits any such breach shall, whether he acts with or without the permission of the holder of the licence or permit, be liable to the same punishment.

CHAPTER IV.

ESTABLISHMENT AND CONTROL.

Appointment of officers and withdrawal of powers.

25. The Provincial Government may, from time to time, by notification—

(*a*) appoint an officer to exercise all the powers of a Collector under this Act in all local areas in which it is in force and to have the control of the administration of the provisions of this Act in such areas;

(*b*) appoint any person other than the Collector of land revenue to exercise within a district all or any of the powers and to perform all or any of the

duties of a Collector under this Act, either concurrently with or in exclusion of the Collector of land revenue, subject to such control as the Provincial Government may from time to time direct;

(*c*) withdraw from the Commissioner or the Collector of land revenue any or all of the Powers conferred on him by this Act;

(*d*) appoint, paid or honorary officers with such designations, powers and duties as the Provincial Government may think fit;

(*e*) order that all or any of the powers and duties assigned to any person under clause (*d*) shall be exercised and performed by any existing Government official or any other person; and

(*f*) delegate to any Prohibition Officer all or any of their powers under this Act.

Prohibition Committees.

26. (1) The Collector or other Prohibition Officer in charge of a district may constitute prohibition committees in every taluk thereof to assist him in carrying out the objects of this Act in the district.

(2) Every member of a prohibition committee shall observe the working of this Act in his taluk and report thereon and on every matter connected therewith at the prescribed intervals and at any other time he thinks fit, to the Collector or other Prohibition Officer aforesaid.

(3) Every member of a prohibition committee shall be entitled to give information at any police station in his taluk regarding the commission or suspected commission of any offence against this Act in such taluk, and the officer in charge of such station shall take action on such information and investigate the case in the manner laid down in the Code of Criminal Procedure, 1898.

Power of Provincial Government to authorise officers to admit persons arrested to bail.

27. The Provincial Government may, by notification, and subject to such conditions as may be prescribed in such notification, empower all or any of the officers or classes of officers or persons mentioned in S. 32 throughout the Province or in any local area, to admit a person arrested under that section to bail to appear, when summoned or otherwise directed, before a Police or Prohibition Officer or Magistrate having jurisdiction to inquire into the offence for which such person has been arrested, and may cancel or vary such notification.

CHAPTER V.

Powers, Duties and Procedure of Officers, etc.

Issue of search warrants.

28. If any Collector, Prohibition Officer or Magistrate upon information obtained and after such inquiry as he thinks necessary, has reason to believe that an offence under sub-section (1) of section 4 has heen committed, he may issue a warrant for the search for any liquor, intoxicating drug, materials, still, utensil, implement or apparatus in respect of which the alleged offence has been committed. Any person who has been entrusted with the execution of such a warrant may detain and search, and if he thinks proper, arrest any person found in the place searched, if he has reason to believe such person to be guilty of any offence under this Act;

Provided that every person arrested under this section shall be admitted to bail by the person arresting, if sufficient bail be tendered for his appearance either before a Magistrate or before a Police or Prohibition Officer as the case may be.

Before issuing such warrant, the Collector, Prohibition Officer or Magistrate shall examine the informant on oath and the examination shall be reduced into writing in a summary manner and be signed by the informant, and also by the Collector, Prohibition Officer or Magistrate.

Powers of entry and search without warrant.

29. Whenever a Collector, any Prohibition Officer not below such rank as the Provincial Government may determine, any Police Officer not below the rank of sub-inspector, any officer in charge of a police station, or any other paid or honorary officer authorized by the Provincial Government in this behalf has reason to believe that an offence under sub-section (1) of section 4 has been committed and that the delay occasioned by obtaining a search warrant under S. 28 will prevent the execution thereof, he may, after recording his reasons and the grounds of his belief, at any time by day or night enter and search any place and may seize anything found therein which he has reason to believe to be liable to confiscation under this Act: and may detain and search and, if he thinks proper, arrest any person found in such place whom he has reason to believe to be guilty of any offence under this Act:

Provided that every person arrested under this section shall be admitted to bail by such officer as aforesaid if sufficient bail be tendered for his appearance either before a Magistrate or before a Police or Prohibition Officer as the case may be.

Power to enter and inspect places of manufacture and sale.

30. The Collector, any Prohibition Officer not below such rank as the Provincial Government may determine, or any Police or other paid or honorary officer authorized by the Provincial Government in this behalf, may enter and inspect, at any time by day or by night, any place in which it is reasonably suspected that any person draws toddy or carries on the manufacture of any other liquor or any intoxicating drug, or stores any liquor or intoxicating drug: and may enter and inspect, at any time, any place in which any liquor or intoxicating drug is reasonably suspected to be kept for sale by any person, and may examine, test, measure or weigh any material, still, utensil, implement, apparatus, liquor or intoxicating drug found in such place.

Power to use force in case of resistance to entry.

31. If any officer empowered to make an entry under S. 28, 29 or 30 cannot otherwise make such entry it shall be lawful for him to break open any outer or inner door or window and to remove any other obstacles to his entry into any such place.

Arrest of offenders and seizure of contraband liquor and articles without warrant.

32. Any Prohibition Officer, any officer of the Police or Land Revenue departments, and any other person authorized in that behalf—

(*a*) may arrest without warrant any person found committing an offence punishable under sub-sec. (1) of S. 4;

(*b*) may seize and detain any liquor, drug or other article which he has reason to believe to be liable to confiscation under this Act; and

(*c*) may search any person, vessel, vehicle, animal, package, receptacle or covering, upon whom, or in or upon which, he may have reasonable cause to suspect any such liquor, drug or other article to be, or to be concealed:

Provided that if the officer or person making the arrest under this section be not empowered under S. 27 to admit to bail, the person arrested shall be forthwith forwarded to an officer so empowered, if such an officer is known to be within a distance of five miles from the place where such arrest took place. And it shall be the duty of such officer empowered as aforesaid to admit such person to bail if sufficient bail be tendered for his appearance before a Police or Prohibition Officer or Magistrate having jurisdiction to inquire into the case.

Arrest of persons refusing to give name or giving false name.

33. Any person, who may be accused or reasonably suspected of committing an offence against this Act, and who on demand made by any Prohibition Officer or ony officer of the Police or Land Revenue departments or by any other person authorized in that behalf refuses to give his

name and residence or who gives a name or residence which such officer or person has reason to believe to be false, may be arrested by such officer or person in order that his name and residence may be ascertained.

Searches how to be made.

34. All searches under the provisions of this Act shall be made in accordance with the provisions of the Code of Criminal Procedure, 1898.

Duty of Officials of all departments and local bodies to assist.

35. Officials of all departments of the Provincial Government and of all local bodies shall be legally bound to assist any Prohibition or Police Officer in carrying out the provisions of this Act.

Offences to be reported, etc.

36. Every official employed by the Provincial Government or by any local body, other than a Police or Prohibition Officer, shall be bound to give immediate information at the nearest police station or to a Prohibition Officer, of all breaches of any of the provisions of this Act which may come to his knowledge; and all such officials shall be bound to take all reasonable measures in their power to prevent the commission of any such breaches which they may know or have reason to believe are about or likely to be committed.

Landholders and others to give information.

37. All zamindars, proprietors, tenants, undertenants and cultivators who own or hold land or house-property on or in which there shall be any tapping for toddy or manufacture of liquor or intoxicating drugs shall in the absence of reasonable excuse be bound to give notice of the same to a Magistrate or to a Prohibition Officer or to an officer of the Police or Land Revenue departments immediately the same shall have come to their knowledge.

Persons arrested how to be dealt with.

38. (1) When any person is arrested under the provisions of S. 28, 29, 32 or 33, the person arresting him shall, unless bail shall have been accepted under the provisions of S. 28, 29 or 32, forthwith forward him to the nearest police station or to a Prohibition Officer, with a report of the circumstances under which such arrest was made.

Procedure of Police station officer.

(2) On any such person being brought to a police station as aforesaid, the officer in charge thereof shall either admit him to bail to appear when summoned, before himself, or before the Prohibition Officer if any, or any Police Officer within the limits of the jurisdiction of which Prohibition or Police Officer, the offence with which he is charged is suspected to have been committed, or, in default of bail, shall forward him in custody to such officer.

Procedure of Police or Prohibition Officer empowered to inquire.

(3) On any such person being brought in custody before a Prohibition or Police Officer as aforesaid or appearing before such officer on bail or when such officer as aforesaid has himself made the arrest such officer shall hold such inquiry as he may think necessary and shall either release such person, or forward him in custody to, or admit him to bail to appear before, the Magistrate having jurisdiction to inquire into or try the case:

Provided that if such inquiry is not commenced and completed on the day on which such person is arrested by or is brought or appears before such officer, he shall, if sufficient bail be tendered for the appearance of the person arrested, admit such person to bail to appear on any subsequent day before himself or any other officer having jurisdiction to inquiry into the case.

Persons arrested to be admitted to bail.

39. It shall be the duty of any officer arresting any person under the powers conferred by S. 28 or 29 and of any officer in charge of a police station or any Police or Prohibition Officer before whom a person arrested is brought or appears under the provisions of S. 38 to release such person on bail if sufficient bail be tendered

for his appearance before a Police or Prohibition Officer or before a Magistrate as the case may be.

Bond of accused and sureties.

40. (1) Before any person is released on bail, a bond in such sufficient but not excessive sum of money as the officer admitting him to bail thinks proper shall be executed by such person and by one or more sureties, conditioned that such person shall attend in accordance with the terms of the bond and shall continue to attend until otherwise directed by the Police or Prohibition Officer before whom he was bailed to attend, or by the Magistrate, as the case may be:

Provided that the officer admitting any such person to bail may in his discretion dispense with the requirement of a surety or sureties to the bond executed by such person.

(2) The Provincial Government shall from time to time determine the form of the bond to be used in any local area.

Procedure in case of default of person admitted to bail to appear before Prohibition Officer.

41. When by reason of default of appearance of a person bailed to appear before a Police or Prohibition Officer, such officer is of opinion that proceedings should be had to compel payment of the penalty or penalties mentioned in the bond of the person bailed or of the surety or sureties, he shall forward the bond to the Magistrate having jurisdiction to inquire into or try the offence of which the person bailed was accused, and the Magistrate shall proceed to enforce the payment of the penalty or penalties in the manner provided by the Code of Criminal Procedure, 1898, for the recovery of penalties in the like case of default of appearance by a person bailed to appear before his own Court.

Power of Police or Prohibition Officers to summon witnesses.

42. Any Police or Prohibition Officer holding an inquiry in the manner provided in section 38 may summon any person to appear before himself to give evidence on such inquiry or to produce any document relevant thereto which may be in his possession or under his control:

Provided that no such officer shall so summon any person to appear before him if the journey to be made for complying with such summons exceeds ten miles by road or fifty miles by rail or such other limits as the Provincial Government may fix.

Terms of summons.

43. Every summons issued under S. 42 shall state whether the person summoned is required to give evidence or to produce a document, or both, and shall require him to appear before the said office at a stated time and place.

Examination of witnesses.

44. Persons so summoned shall attend as required and shall answer all questions relating to such inquiry put to them by such officer. Such answers shall be reduced to writing and shall be signed by such officer.

When attendance of witnesses to be dispensed with and procedure in such cases.

45. It shall be lawful for a Police or Prohibition Officer, instead of summoning to appear before him any person who, from sickness or other infirmity, may be unable so to do, or whom by reason of rank or sex, it may not be proper to summon, to proceed to the residence of such person and there to require him to answer such questions as he may consider necessary with respect to such inquiry; and such person shall be bound so to answer accordingly, and the provisions of S. 44 shall apply to such answers.

Power of Police or Prohibition Officer to summon suspected persons.

46. Any Police or Prohibition Officer may after recording his reasons in writing, summon any person to appear before him whom he has good reason to suspect of having committed an offence under this Act. On such person appearing before such officer, the procedure prescribed by Ss. 38 to 45 shall become applicable.

The officer may also, if he considers it necessary for the investigation of the case, exercise the powers conferred by Ss. 42 to 45 before summoning the person suspected.

Law relating to criminal courts as to summoning of witnesses to apply.

47. The law for the time being in force as to summonses and compelling the attendance of persons summoned in criminal courts shall, so far as the same may be applicable, apply to any summons issued by a Police or Prohibition Officer and to any person summoned by him to appear under the provisions of this Act.

Report of Police or Prohibition Officer to give jurisdiction to competent Magistrate.

48. When a police or Prohibition Officer forwards in custody any person accused of an offence under this Act to the Magistrate having jurisdiction to inquire into or try the case, or admits any such person to bail to appear before such Magistrate, such officer shall also forward to such Magistrate a report setting forth the name of the accused person and the nature of the offence with which he is charged and the names of the persons who appear to be acquainted with the circumstances of the case, and shall send to such Magistrate any article which it may be necessary to produce before him. Upon receipt of such report the Magistrate shall inquire into such offence and try the person accused thereof in like manner as if complaint had been made before him as prescribed in the Code of Criminal Procedure, 1898.

Powers of Police and Prohibition Officers to cause attendance of witnesses before Magistrate.

49. When a Police or Prohibition Officer forwards in custody any person accused of an offence against this Act to the Magistrate having jurisdiction to inquire into or try the case, or admits him to bail to appear before suchMagistrate, such officer shall exercise all the powers conferred by the Code of Criminal Procedure, 1898, on an officer in charge of a police station in respect to causing the appearance before such Magistrate of such persons acquainted with the facts and circumstances of the case as he considers it necessary that such Magistrate shall examine as witnesses for the prosecution of such case.

Accused not to be detained in custody for a longer period than twenty-four hours without special authority.

50. No person accused or suspected of having committed an offence under this Act shall be detained for a longer period than under all the circumstances of the case is reasonable; and such period shall not, in the absence of the special order of a Magistrate, whether having jurisdiction to try the case or not, exceed twenty-four hourse, exclusive of the time necessary for the journey of such person to the place where a Police or Prohibition Officer may be and from thence to the court having jurisdiction to try the case.

Police to take charge of articles seized.

51. All officers in charge of police stations shall take charge of and keep in safe custody pending the orders of a Magistrate or of a Prohibition Officer, all articles seized under this Act which may be delivered to them; and shall allow any Prohibition Officer who may accompany such articles to the police station, or who may be deputed for the purpose by his superior officer, to affix his seal to such articles and to take samples of and from them. All samples so taken shall also be sealed with the seal of the officer in charge of the police station.

Power of District Magistrate to transfer cases.

52. The District Magistrate shall have power to transfer any case under this Act pending inquiry or trial before any Magistrate or Officer in the district to any other Magistrate or Officer therein.

Operation of the Code of Criminal Procedure, 1898.

53. Nothing contained in this Act shall affect the operation of the Code of Criminal Procedure, 1898.

CHAPTER VI.

RULES AND NOTIFICATIONS.

Power to make rules.

54. (1) The Provincial Government may make rules for the purpose of carrying into effect the provisions of this Act.

(2) In particluar and without prejudice to the generality of the foregoing provision, the Provincial Government may make rules—

(*a*) for the issue of licences and permits and the enforcement of the conditions thereof;

(*b*) prescribing the powers to be exercised and the duties to be performed by paid and honorary Prohibition Officers in furtherance of the objects of the Act;

(*c*) determining the local jurisdiction of Police and Prohibition Officers in regard to inquiries and the exercise of preventive and investigating powers;

(*d*) authorizing any officer or person to exercise any power or perform any duty under this Act;

(*e*) prescribing the powers and duties of prohibition committees and the members thereof and the intervals at which the members of such committees shall make their reports;

(*f*) regulating the delegation by the Commissioner or by Collectors or other district officers of any powers conferred on them by or under this Act;

(*g*) regulating the cultivation of the hemp plant, the collection of those portions of such plant from which intoxicating drugs can be manufactured and the manufacture of such drugs therefrom;

(*h*) declaring how denatured spirit shall be manufactured;

(*i*) declaring in what cases or classes of cases and to what authorities appeals shall lie from orders, whether original or appellate, passed under this Act or under any rule made thereunder, or by what authorities such orders may be revised, and prescribing the time and manner of presenting appeals, and the procedure for dealing therewith.

(*j*) for the grant of batta to witnesses, and of compensation for loss of time to persons released under sub-section (3) of S. 38 on the ground that they have been improperly arrested, and to persons charged before a Magistrate with offences under this Act and acquitted;

(*k*) regulating the power of Police and Prohibition Officers to summon witnesses from a distance under S. 42; and

(*l*) for the disposal of articles confiscated and of the proceeds thereof.

Publication of rules and notifications.

55. All rules made and notifications issued under this Act shall be published in theOfficial Gazette and upon such publication, shall have effect as if enacted in this Act.

CHAPTER VII.

LEGAL PROCEEDINGS.

Actions against the Crown, etc.

56. No action shall lie against the Crown or against any Prohibition, Police or other officer, for damages in any civil court for any act *bona fide* done or ordered to be done in pursuance of this Act.

Courts to take judicial notice of appointments.

57. All courts shall take judicial notice of all notifications and orders conferring powers, imposing duties and making appointments under this Act.

SCHEDULE.

(*See* section 2.)

Year.	No.	Short title or subject.	Extent of repeal.
(1)	(2)	(3)	(4)
		Acts of the Governor of Fort St. George in Council.	
1886	I	The Madras Abkari Act, 1886.	The whole.
1905	I	The Madras Abkari (Amendment) Act, 1905.	Do.
1913	I	The Madras Abkari (Amendment) Act, 1913.	Do.
1915	I	The Madras Abkari (Amendment) Act, 1915.	Do.
		Acts of the Madras Legislature.	
1929	XVIII	The Madras Abkari (Amendment) Act, 1929.	Do.
		Act of the Indian Legislature.	
1930	II	The Dangerous Drugs Act, 1930.	So much of Schedule II as relates to the Madras Abkari Act, 1886.

THE MADRAS LOCAL BOARDS (AMENDMENT) ACT, 1937.

ACT NO. XI OF 1937.

[*4th October, 1937.*

An Act further to amend the Madras Local Boards Act, 1920, *and the Madras Local Boards and Elementary Education (Amendment) Act,* 1934, *for certain purposes.*

WHEREAS it is expedient further to amend the Madras Local Boards Act, 1920, and the Madras Local Boards and Elementary Education (Amendment) Act, 1934, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS LOCAL BOARDS (AMENDMENT) ACT, 1937.

Amendment of rule 7 of the Schedule, Madras Act II of 1934.

2. Clause (*cc*) of rule 7 of the Schedule to the Madras Local Boards and Elementary Education (Amendment) Act, 1934, shall be omitted.

Nominated members of District Boards to vacate office and co-option of representatives of women and of minority communities.

3. All persons nominated to any district board under clause (*cc*) aforesaid shall cease to hold office with effect from the commencement of this Act, and the Provincial Government may if they think fit, notwithstanding anything contained in sub-section (3) of section 9 of the Madras Local Boards Act, 1920, direct the elected members of the district board to co-opt as its members—

(*a*) one representative of women, and

(*b*) one representative each of such of the communities mentioned in clauses (*a*) to (*e*) of sub-section (1) of the said section 9 as the Provincial Government may determine:

Provided that no such direction shall be given: in the case of women, if a woman is a member of the district board, and

in the case of community if a member of that community is a member of the district board;

having been elected thereto to fill a seat reserved for women or for the community concerned, as the case may be.

Qualifications to be possessed by co-opted members.

4. No person shall be co-opted as a member of a district board under this Act unless the name of such person appears on its electoral roll and such person is otherwise qualified for election to the district board under Chapter IV of the Madras Local Boards Act, 1920.

Term of office of co-opted members.

5. Members co-opted to any district board under this Act shall, subject to the provisions of sub-section (2) of section 54 and sections 56, 57 and 59 of the Madras Local Boards Act, 1920, and of section 8 of this Act hold office until the date on which the elected members of the district board would vacate their offices by efflux of time.

Casual vacancies.

6. If a member co-opted to any district board under this Act vacates office before the date referred to in section 5, the elected members of the district board shall co-opt another person to fill the vacancy. The person co-opted shall be a woman or a person belonging to the community concerned, as the case may be.

Explanation.—The provisions of sections 4 and 5 shall apply to a member co-opted under this section.

Procedure.

7. The procedure for the election of persons who are not members of a district board to the standing committees referred to in section 27-A of the Madras Local Boards Act, 1920, shall *mutatis mutandis* apply to the co-option of members by a district board under this Act.

Amalgamation of bifurcated district boards.

8. Notwithstanding anything contained in section 3-A of the Madras Local Boards Act, 1920, the Provincial Government shall have power, at any time by notification, to amalgamate two or more districts which were constituted from a single district by a notification under that section, and thereupon the following provisions shall apply :—

(i) All the elected members of each of the district boards which are amalgamated (hereinafter referred to as the old boards) who were holding office immediately before the date of issue of the notification under this section shall, with effect on and from such date, be deemed to have become members of the amalgamated district board (hereinafter referred to as the new board), and the co-opted members, if any, of the old boards shall, with effect on and from the same date, be deemed to have vacated their offices.

(ii) The members of the new board shall, subject to the provisions of sub-section (2) of section 54 and sections 56, 57 and 59 of the Madras Local Boards Act, 1920, hold office until the date on which they would have vacated their offices on the old boards by efflux of time if a notification under this section had not been issued.

Section 7 of the Madras Local Boards Act, 1920, in so far as it fixes the maximum number of members of a district board shall not apply to the new board until the date aforesaid.

(iii) The circles of the old boards as existing on the date of issue of the notification under this section shall be the circles of the new board, unless and until the Provincial Government otherwise direct by a notification under section 47 of the Madras Local Boards Act, 1920.

(iv) If any vacancy in the office of an elected member of any of the old boards existed at the time of issue of the notification under this section, a member shall be elected to the new board at a casual election by the circle concerned.

(v) If any vacancy in the office of a member of the new board occurs otherwise than by efflux of time, such vacancy shall be filled by a casual election by the circle concerned, and any person elected at such an election shall hold office only so long as the member in whose place he is elected would have been entitled to hold office if the vacancy had not occurred.

(vi) The presidents and vice-presidents of the old boards holding office on the date of issue of the notification under this section shall be deemed to have vacated their respective offices with effect on and from such date, and the members of the new board shall, as soon as may be thereafter,—

(*a*) meet for the election of a president on such date as may be fixed in that behalf by the Collector of the district; and

(*b*) meet for the election of the vice-president on such date as may be fixed in that behalf by the president so elected.

Power to remove difficulties.

9. If any difficulty arises in giving effect to the provisions of this Act, the Provincial Government may, by order, as occasion may require, do anything which appears to them to be necessary to remove the difficulty.

THE MADRAS REGULATION OF THE SALE OF CLOTH ACT, 1937.

ACT NO. XII OF 1937.

[*7th October, 1937.*

An Act to regulate the trade of dealers in cloth within the Province of Madras.

WHEREAS it is expedient to regulate the trade of dealers in cloth and articles of wearing apparel made of cloth within the Province of Madras; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE MADRAS REGULATION OF THE SALE OF CLOTH ACT, 1937.

(2) It extends to the whole of the Province of Madras.

Dealing in cloth to be licensed.

2. (1) Every person who, on the date of the commencement of this Act, is carrying on the business of a dealer in cloth or in articles of wearing apparel made of cloth, in the Province shall, within two months of such date, obtain a licence under this Act for carrying on such business.

(2) Every person who after the date of the commencement of this Act starts the business of a dealer in cloth or in articles of wearing apparel made of cloth in the Province shall, within two months of starting such business, obtain a licence under this Act for carrying on such business.

Explanation.—Where a dealer has more than one shop or place of business whether in the same town or village or in different towns and villages, he shall obtain a separate licence in respect of each shop or place of business.

Expiry and renewal of licence.

3. Every licence granted under this Act shall expire on the last day of the year for which it was granted but may be renewed from year to vear.

Explanation.—In this section 'year' shall mean the financial year.

Fee for licence.

4. (1) The fee payable for the grant or renewal of a licence in respect of the business at any one shop or place of business shall be—

(*a*) two rupees, where the monthly turnover of business in that shop or place of business as determined by rules made under this Act, does not exceed three thousand rupees; and

(*b*) five rupees, where such monthly turnover exceeds three thousand rupees:

Provided that no fee shall be levied for the grant or renewal of a licence in respect of the business carried on at any shop or place of business, if it relates exclusively to cloth woven on hand-looms or articles of wearing apparel made therefrom and the dealer declares in writing that he has not sold and will not sell any other cloth or articles of wearing apparel made of cloth at such shop or place of business during the period of currency of the licence.

Explanation.—In this sub-section 'monthly turnover' means the aggregate amount for which sales are effected in a month.

(2) Where a licence is granted or renewed free of fee under the proviso to sub-section (1), the licence shall become void if any cloth not woven on hand-looms or any article of wearing apparel not made therefrom is sold at the place mentioned in the licence, and no cloth or article of wearing apparel made of cloth shall thereafter be sold at such place unless a fresh licence has been obtained on payment of the fee specified in sub-section (1).

5. The provisions of this Act shall be applicable *mutatis mutandis* to hawkers of cloth or of articles of wearing apparel made of cloth, provided however that a hawker shall be liable to obtain only one licence for a financial year, whatever his area of operations may be.

Penalty for failure to obtain licence.

6. A person who in respect of any financial year fails to obtain a licence as required by sub-section (1) or sub-section (2) of section 2, or to renew a licence before the date on which it expires, or to obtain a fresh licence as required by sub-section (2) of section 4, shall be liable to pay in respect of such year twice the amount of the fee payable by him under sub-section (1) of section 4, or if no fee is so payable, a fee of one rupee; and any amount payable under this section may be recovered as if it were an arrear of land revenue. On payment or recovery of the amount prescribed by this section, a licence shall be deemed to have been granted to or renewed in favour of the person aforesaid for the financial year, to which such payment or recovery relates.

Power to make rules.

7. The Provincial Government shall have power to make rules—

(*a*) prescribing the authority competent to grant or renew licences under this Act,

(*b*) for determining the monthly turnover for the purpose of levying the licence fee,

(*c*) for the recovery of any amounts due under this Act; and

(*d*) generally for carrying into effect the purposes of this Act.

THE MADRAS STATE AID TO INDUSTRIES (AMENDMENT) ACT, 1937.

ACT No. XIII OF 1937.

An Act further to amend the Madras State Aid to Industries Act, 1922, for certain purposes.

WHEREAS it is expedient further to amend the Madras State Aid to Industries Act, 1922, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS STATE AID TO INDUSTRIES (AMENDMENT) ACT, 1937.

Insertion of new section I-A in Madras Act V of 1923.

2. After section 1 of the Madras State Aid to Industries Act, 1922 (hereinafter referred to as the said Act), the following section shall be inserted, namely:—

Definitions. "1-A. In this Act—

(i) 'cottage industry' means any industry carried on by a worker in his own home; and

(ii) 'village industry' means any industry which forms the normal occupation, whether whole time or part time, of any class of the rural population of the Province."

Amendment of section 6, Madras Act V of 1923. 3. For clause (*c*) of section 6 of the said Act, the following clause shall be substituted, namely:—

(*c*) by paying a subsidy, in the case of a cottage industry for any purpose, and in the case of any other industry for the conduct of research or the purchase of machinery."

Amendment of section 16, Madras Act V of 1923. 4. In section 16 of the said Act, after the words "No subsidy" in the second paragraph, the words "to an industry other than a cottage industry" shall be inserted.

Amendment of section 20, Madras Act V of 1923. 5. In section 20 of the said Act, after clause (*d*), the following clause shall be added, namely:—

(*e*) from assisting a village industry in any manner which may be determined by the Provincial Government."

THE MADRAS REVENUE RECOVERY AND CITY LAND-REVENUE (AMENDMENT) ACT, 1937.

ACT No. XIV OF 1937.

An Act further to amend the Madras Revenue Recovery Act, 1864, *and the Madras City Land-Revenue* (*Amendment*) *Act,* 1867, *for certain purposes.*

WHEREAS it is expedient further to amend the Madras Revenue Recovery Act, 1864, and the Madras City Land-Revenue (Amendment) Act, 1867, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title. 1. This Act may be called THE MADRAS REVENUE RECOVERY AND CITY LAND-REVENUE (AMENDMENT) ACT, 1937.

Insertion of new section 36-A in Madras Act II of 1864. 2. After section 36 of the Madras Revenue Recovery Act, 1864, the following section shall be inserted, namely:—

Certain provisions of section 36 not to apply to cases of purchase by Government. "36-A. The provisions of the Third and Fourth clauses of section 36 shall not apply to cases where immovable property sold under this Act is purchased by the Government."

Insertion of new section 18-A in Madras Act VI of 1867. 3. After section 18 of the Madras City Land-Revenue (Amendment) Act, 1867, the following section shall be inserted, namely:—

Certain provisions of section 18 not to apply to cases of purchase by Government. "18-A. The provisions of the Third and Fourth clauses of section 18 shall not apply to cases where immovable property sold under this Act is purchased by the Government."

Operation of Act and savings. 4. (1) The Madras Revenue Recovery Act, 1864, shall in its application to the Province of Madras be read and construed as if section 36-A had formed part of that Act from its commencement.

(2) The Madras City Land-Revenue (Amendment) Act, 1867, shall be read and construed as if section 18-A had formed part of that Act from its commencement.

(3) Nothing contained in this Act shall be deemed to invalidate any decree or order passed by a Civil Court before the commencement of this Act which has become final.

THE MADRAS CITY MUNICIPAL, DISTRICT MUNICIPALITIES AND LOCAL BOARDS (AMENDMENT) ACT, 1937.

ACT No. XV OF 1937.

An Act further to amend the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, the Madras Local Boards Act, 1920, and the Madras Local Boards (Amendment) Act, 1935, for certain purposes.

WHEREAS it is expedient further to amend the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, the Madras Local Boards Act, 1920, and the Madras Local Boards (Amendment) Act, 1935, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS CITY MUNICIPAL, DISTRICT MUNICIPALITIES AND LOCAL BOARDS (AMENDMENT) ACT, 1937.

Amendment of Madras Act IV of 1919.

2. Notwithstanding anything contained in sections 55-A and 414 of the Madras City Municipal Act, 1919, the Provincial Government shall have power from time to time to extend the term of office of the fifteen divisional councillors who are due to vacate their offices at noon on the first day of November, 1937, up to such date not being later than 31st day of March, 1938, as the Provincial Government may fix and to postpone the elections to the divisional seats accordingly.

Amendment of Madras Act V of 1920.

3. (1) Notwithstanding anything contained in sections 8 and 368 of the Madras District Municipalities Act, 1920, the Provincial Government shall have power from time to time to extend the term of office of the councillors of every municipality, who are due to vacate their offices at noon on the 1st day of November, 1937, up to such date not being later than the 31st day of March, 1938, as the Provincial Government may fix and to postpone the elections to such municipalities accordingly.

(2) Where any municipality has been constituted for the first time or has to be reconstituted after a dissolution or supersession, the Provincial Government shall have power, notwithstanding anything contained in the Madras District Municipalities Act, 1920, from time to time to postpone the constitution or reconstitution of the municipality and the elections thereto up to such date not being later than the 31st day of March, 1938, as the Provincial Government may fix.

Amendment of Madras Acts XIV of 1920 and XIII of 1935.

4. (1) Notwithstanding anything contained in sections 11 and 240 of the Madras Local Boards Act, 1920, or in section 7 of the Madras Local Boards (Amendment) Act, 1935, the Provincial Government shall have power from time to time to extend the term of office of the members of every local board situated in any of the districts included in Group I of the Schedule to the Madras Local Boards (Amendment) Act, 1935, up to such date not being later than the 31st day of March, 1938, as the Provincial Government may fix and to postpone the elections to such local boards accordingly.

(2) Where any local board has been constituted for the first time or has to be reconstituted after a dissolution or supersession, the Provincial Government shall have power notwithstanding anything contained in the Madras Local Boards Act, 1920, from time to time to postpone the constitution or reconstitution of the local board and the elections thereto up to such date not being later than the 31st day of March, 1938, as the Provincial Government may fix.

THE INDIA ACTS

AND

THE MADRAS ACTS.

1937.

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INDIA ACTS, 1937.

THE AGRICULTURAL PRODUCE (GRADING AND MARKING) ACT, 1937.

ACT No. I OF 1937.

[24*th February,* 1937.

An Act to provide for the grading and marking of agricultural produce.

WHEREAS it is expedient to provide for the grading and marking of agricultural produce; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE AGRICULTURAL PRODUCE (GRADING AND MARKING) ACT, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas but excluding Burma.

Explanations.

2. In this Act, unless the contrary appears from the subject or context,—

(*a*) "agricultural produce" includes all produce of agriculture or horticulture and all articles of food or drink wholly or partly manufactured from any such produce, and fleeces and the skins of animals;

(*b*) "counterfeit" has the meaning assigned to that word by S. 28 of the Indian Penal Code;

(*c*) "covering" includes any vessel, box, crate, wrapper, tray or other container;

(*d*) "grade designation" means a designation prescribed as indicative of the quality of any scheduled article;

(*e*) "grade designation mark" means a mark prescribed as representing a particular grade designation;

(*f*) "quality", in relation to any article, includes the state and condition of the article;

(*g*) "prescribed" means prescribed by rules made under this Act;

(*h*) "scheduled article" means an article included in the Schedule; and

(*i*) an article is said to be marked with a grade designation mark, if the article itself is marked with a grade designation mark or any covering containing or label attached to such article is so marked.

Prescription of grade designations.

3. The Governor-General in Council may, after previous publication by notification in the *Gazette of India,* make rules—

(*a*) fixing grade designations to indicate the quality of any scheduled article;

(*b*) defining the quality indicated by every grade designation;

(*c*) specifying grade designation marks to represent particular grade designations;

(*d*) authorising a person or a body of persons, subject to any prescribed conditions, to mark with a grade designation mark any article in respect of which such mark has been prescribed or any covering containing or label attached to any such article;

(*e*) specifying the conditions referred to in clause (*d*) including in respect of any article conditions as to the manner of marking, the manner in which the article shall be packed, the type of covering to be used, and the quantity by weight, number or otherwise to be included in each covering;

(*f*) providing for the payment of any expenses incurred in connection with the manufacture or use of any implement necessary for the reproduction of a grade designation mark or with the manufacture or use of any covering or label marked with a grade designation mark; and

(*g*) providing for the confiscation and disposal of produce marked otherwise than in accordance with the prescribed conditions with a grade designation mark.

Penalty for unauthorised marking with grade designation mark.

4. Whoever marks any scheduled article with a grade designation mark, not being authorised to do so by rule made under S. 3, shall be punishable with fine which may extend to Rs. 500.

Penalty for counterfeiting grade designation mark.

5. Whoever counterfeits any grade designation mark or has in his possession any die, plate or other instrument for the purpose of counterfeiting a grade designation mark shall be punishable with imprisonment which may extend to two years, or with fine, or with both.

Extension of application of Act.

6. The Governor-General in Council, after such consultation as he thinks fit of the interests likely to be affected, may by notification in the *Gazette of India* declare that the provisions of this Act shall apply to an article of agricultural produce not included in the Schedule, and on the publication of such notification such article shall be deemed to be included in the Schedule.

THE SCHEDULE.

(*See* Section 2).

1. Fruit.
2. Vegetables.
3. Eggs.
4. Dairy produce.
5. Tobacco.
6. Coffee.
7. Hides and skins.

THE INDIAN NAVAL ARMAMENT (AMENDMENT) ACT, 1937.

ACT NO. II OF 1937.

[*4th March,* 1937.

An Act further to amend the Indian Naval Armament Act, 1923, *for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Naval Armament Act, 1923, for the purpose of giving effect in British India to the Treaty for the Limitation of Naval Armament and for the Exchange of Information concerning Naval Construction signed in London on behalf of His Majesty on the twenty-fifth day of March, 1936; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN NAVAL ARMAMENT (AMENDMENT) ACT, 1937.

Amendment of preamble to Act VIII of 1923.

2. In the preamble to the Indian Naval Armament Act, 1923 (hereinafter referred to as the said Act), for the words beginning "Treaty for the Limitation of Naval Armament signed at Washington" and ending "signed at London on behalf of His Majesty on the twenty-second day of April, 1930" the following shall be substituted, namely:

"Treaty for the Limitation of Naval Armament and for the Exchange of Information concerning Naval Construction signed in London on behalf of His Majesty on the twenty-fifth day of March, 1936".

Amendment of S. 2, Act VII of 1923.

3. In S. 2 of the said Act, for clause (*c*) the following clause shall be substituted, namely:—

"(*c*) 'the Treaty' means the Treaty for the Limitation of Naval Armament and for the Exchange of Information concerning Naval Construction signed in London on behalf of His Majesty on the twenty-fifth day of March, 1936".

Amendment of S. 4, Act VII of 1923.

4. To S. 4 of the said Act the following sub-section shall be added, namely:—

"(3) Any person who, in pursuance of a licence granted under sub-section (1) before the commencement of the Indian Naval Armament (Amendment) Act, 1937, is engaged in building any vessel of war or in altering, arming or equipping any ship so as to adapt her for use as a vessel of war, or is about to despatch or deliver, or allow to be despatched or delivered, from any place within British India any ship which has been so built, altered, armed or equipped, either entirely or partly, within British India, shall, upon written demand, furnish to the Local Government such designs and particulars as may be required by the Local Government for the purpose of securing the observance of the obligations imposed by the Treaty".

Amendment of S. 5, Act VII of 1923.

5. In sub-section (1) of S. 5 of the said Act, after the word and figure "S. 3" the following shall be inserted, namely:—

"or fails to comply with the provisions of sub-section (3) of S. 4".

Omission of the Schedule to Act VII of 1923.

6. The Schedule to the said Act shall be omitted.

THE LAND CUSTOMS (AMENDMENT) ACT, 1937.

ACT No. III OF 1937.

[*4th March,* 1937.

An Act further to amend Land Customs Act, 1924, *for certain purposes.*

WHEREAS it is expedient further to amend the Land Customs Act, 1924, for the purposes hereinafter appearing;

And whereas it is expedient that certain other enactments should be repealed;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE LAND CUSTOMS (AMENDMENT) ACT, 1937.

(2) It shall come into force on such date as the Governor-General in Council may, by notification in the *Gazette of India,* appoint.

Amendment of long title and preamble, Act XIX of 1924.

2. In the long title and preamble to the Land Customs Act, 1924 (hereinafter referred to as the said Act), for the word "India" the words "British India" shall be substituted.

Amendment of S. 2, Act XIX of 1924.

3. In clause (*f*) of S. 2 of the said Act the brackets and words "(other than territory forming part of a State in India)" shall be omitted.

Omission of S. 10, Act XIX of 1924.

4. S. 10 of the said Act shall be omitted.

Amendment of Schedule, Act XIX of 1924.

5. In the Schedule to the said Act, before the word and figures "S. 167" the word and figures "S. 88" shall be inserted, and for the word and figures "Ss. 169" the word and figures "Ss. 168" shall be substituted.

Repeals.

6. (1) The Acts mentioned in the Schedule are hereby repealed to the extent specified in the fourth column thereof.

(2) All notifications published and all rules and orders made, or deemed to have been made, under any of those Acts and in force immediately before the commencement of this Act shall, so far as they are not inconsistent with the Land Customs Act, 1924, be deemed to have been published and made under that Act.

THE SCHEDULE.

ENACTMENTS REPEALED.

[*See* Section 6 (1).]

Year.	No.	Short title.	Extent of repeal.
		Acts of the Governor-General in Council.	
1844	VI	The Madras Inland Customs Act, 1844.	So much as has not been repealed.
1857	XXIX	The Bombay Land-customs Act, 1857.	So much as has not been repealed.
1874	XV	The Laws Local Extent Act, 1874.	So much of the Second Schedule as relates to Act VI of 1844.
1901	XI	The Amending Act, 1901.	So much of the First Schedule as relates to the Madras Inland Customs Act, 1844, and the Madras Inland Customs (Amendment) Act, 1893.
1920	XXXVIII	The Devolution Act, 1920.	So much of the First Schedule as relates to Act XXIX of 1857.
		Acts of the Indian Legislature.	
1934	XIV	The Sugar (Excise Duty) Act, 1934.	Sub-section (2) of section 6.
1934	XXXII	The Indian Tariff Act, 1934.	Section 7.

Year.	No.	Short title.	Extent of repeal.
		Madras Act.	
1893	II	The Madras Inland Customs (Amendment) Act, 1893.	The whole.
		Bombay Acts.	
1915	III	The Bombay Decentralization Act, 1915.	The Second Schedule.
1921	II	The Bombay Short Titles Act, 1921.	So much of the Schedule as relates to the Bombay Land-customs Act, 1857.

THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1937.

ACT NO. IV OF 1937.

[*4th March*, 1937.

An Act further to amend the Indian Income-tax Act, 1922, *for certain purposes.*

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1922, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1937.

Amendment of S. 16, Act XI of 1922.

2. To S. 16 of the Indian Income-tax Act, 1922 (hereinafter referred to as the said Act), the following sub-section shall be added, namely:—

"(3) In computing the total income of any individual for the purpose of assessment, there shall be included—

(*a*) so much of the income of a wife or minor child of such individual as arises directly or indirectly—

(*i*) from the membership of the wife in a firm of which her husband is a partner;

(*ii*) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner;

(*iii*) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart; or

(*iv*) from assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual; and

(*b*) so much of the income of any association of individuals consisting of such individual and his wife as arises from assets transferred to the association by such individual".

Amendment of S. 18, Act XI of 1922.

3. To sub-section (5) of S. 18 of the said Act the following proviso shall be added, namely:—

"Provided further that where such person or owner is a person whose income is included under the provisions of sub-section (3) of S. 16 in the total income of another person that person shall be deemed to be the person or owner on whose behalf payment has been made and to whom credit shall be given in the assessment for the following year".

Amendment of S. 48, Act XI of 1922.

4. After sub-section (3) of S. 48 of the said Act, the following sub-section shall be inserted, namely:—

"(3-*A*) Where the shareholder referred to in sub-section (1), or the member of a registered firm or the minor admitted to the benefits of partnership referred to in sub-section (2), or the owner of a security referred to in sub-section (3) is a person whose income is included under the provisions of sub-section (3) of S. 16 in the total income of another person, the provisions of sub-sections (1), (2) and (3) shall apply as if that person were himself the person entitled to a refund under those sub-sections".

Operation of S. 2.

5. The amendment made in the said Act by S. 2 shall not have effect in respect of any income chargeable to income-tax for any year ending before the 1st day of April, 1937.

THE INDIAN LAC CESS (AMENDMENT) ACT, 1937.

ACT No. V OF 1937.

[*4th March,* 1937.

An Act further to amend the Indian Lac Cess Act, 1930, *for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Lac Cess Act, 1930, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN LAC CESS (AMENDMENT) ACT, 1937.

Amendment of S. 4, Act XXIV of 1930.

2. In S. 4 of the Indian Lac Cess Act, 1930, for the words "Bihar and Orissa", where they occur in clause (*v*) of sub-section (4) and in clauses (*ii*) and (*v*) of sub-section (5), the word "Bihar" shall be substituted.

THE ARBITRATION (PROTOCOL AND CONVENTION) ACT, 1937.

ACT No. VI OF 1937.

[*4th March,* 1937.

An Act to make certain further provisions respecting the law of arbitration in British India.

WHEREAS India was a State signatory to the Protocol on Arbitration Clauses set forth in the First Schedule, and to the Convention on the Execution of Foreign Arbitral Awards set forth in the Second Schedule, subject in each case to a reservation of the right to limit its obligations in respect thereof to contracts which are considered as commercial under the law in force in British India;

And whereas it is expedient, for the purpose of giving effect to the said Protocol and of enabling the said Convention to become operative in British India, to make certain further provisions respecting the law of arbitration;

It is hereby enacted as follows:—

Short title, extent and operation.

1. (1) This Act may be called THE ARBITRATION (PROTOCOL AND CONVENTION) ACT, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) The provisions of this Act, except this section, shall have effect only from such date as the Governor-General in Council may, by notification in the *Gazette of India,* appoint in this behalf, and the Governor-General in Council may appoint different dates for the coming into effect of different provisions of the Act.

Interpretation.

2. In this Act "Foreign award" means an award on differences relating to matters considered as commercial under the law in force in British India, made after the 28th day of July, 1924,—

(*a*) in pursuance of an agreement for arbitration to which the Protocol set forth in the First Schedule applies, and

(*b*) between persons of whom one is subject to the jurisdiction of some one of such powers as the Governor-General in Council, being satisfied that reciprocal provisions have been made, may, by notification in the *Gazette of India,* declare to be parties to the Convention set forth in the Second Schedule, and of whom the other is subject to the jurisdiction of some other of the powers aforesaid, and

(*c*) in one of such territories as the Governor-General in Council, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies,

and for the purposes of this Act an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Stay of proceedings in respect of matters to be referred to arbitration.

3. Notwithstanding anything contained in the Indian Arbitration Act, 1899, or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings; and the Court unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

Effect of foreign awards.

4. (1) A foreign award shall, subject to the provisions of this Act, be enforceable in British India as if it were an award made on a matter referred to arbitration in British India.

(2) Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence set off or otherwise in any legal proceedings in British India, and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.

Filing of foreign award in Court.

5. (1) Any person interested in a foreign award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

Enforcement of foreign award.

6. (1) Where the Court is satisfied that the foreign award is enforceable under this Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Conditions for enforcement of foreign awards.

7. (1) In order that a foreign award may be enforceable under this Act it must have—

(a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed,

(b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties,

(c) been made in conformity with the law governing the arbitration procedure,

(d) become final in the country in which it was made,

(e) been in respect of a matter which may lawfully be referred to arbitration under the law of British India,

and the enforcement thereof must not be contrary to the public policy or the law of British India.

(2) A foreign award shall not be enforceable under this Act if the Court dealing with the case is satisfied that—

(a) the award has been annulled in the country in which it was made, or

(b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented, or

(c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration:

Provided that if the award does not deal with all questions referred the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in clauses (a), (b) and (c) of sub-section (1), or the existence of the conditions specified in clauses (b) and (c) of sub-section (2), entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

Evidence.

8. (1) The party seeking to enforce a foreign award must produce—

(a) the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made;

(b) evidence proving that the award has become final; and

(c) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in clauses (a), (b) and (c) of sub-section (1) of S. 7 are satisfied.

(2) Where any document requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in British India.

Saving.

9. Nothing in this Act shall—

(a) prejudice any rights which any person would have had of enforcing in British India any award or of availing himself in British India of any award if this Act had not been passed, or

(b) apply to any award made on an arbitration agreement governed by the law of British India.

Rule-making powers of the High Court.

10. The High Court may make rules consistent with this Act as to—

(a) the filing of foreign awards and all proceedings consequent thereon or incidental thereto;

(b) the evidence which must be furnished by a party seeking to enforce a foreign award under this Act; and

(c) generally, all proceedings in Court under this Act.

THE FIRST SCHEDULE.

Protocol on Arbitration Clauses.

The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions:

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The Tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article (1) applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the Arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratification shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the Signatory States.

6. The present Protocol will come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other Signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the undermentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all Signatory States. They will take effect one month after the notification by the Secretary-General to all Signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

THE SECOND SCHEDULE.

Convention on the Execution of Foreign Arbitral Awards.

Article 1. In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary:

(*a*) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(*b*) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(*c*) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(*d*) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appeal or *pourvoi en cassation* (in the countries were such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(*e*) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

Article 2.—Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:

(*a*) That the award has been annulled in the country in which it was made;

(*b*) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(*c*) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

Article 3. If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1 (*a*) and (*c*), and Article 2 (*b*) and (*c*), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Article 4. The party relying upon an award or claiming its enforcement must supply, in particular:

(1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

(2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (*d*), in the country in which it was made;

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2 (*a*) and (*c*), have been fulfilled.

A translation of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translations must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

Article 5. The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Article 6. The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on September, 24th, 1923.

Article 7. The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

Article 8. The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

Article 9. The present Convention may be denounced on behalf of any Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notifications, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present Convention.

Article 10. The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such Colonies, Protectorates or territories to which the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

Article 11. A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of Nations to every Member of the League of Nations and to every non-Member State which signs the same.

THE WORKMEN'S COMPENSATION (AMENDMENT) ACT, 1937.

ACT No. VII OF 1937.

[*4th March*, 1937.

An Act further to amend the Workmen's Compensation Act, 1923, *for a certain purpose.*

WHEREAS it is expedient further to amend the Workmen's Compensation Act, 1923, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE WORKMEN'S COMPENSATION (AMENDMENT) ACT, 1937.

Amendment of S. 35, Act VII of 1923.

2. (1) S. 35 of the Workmen's Compensation Act, 1923, shall be re-numbered as sub-section (1) of that section and in the said section as so re-numbered—

(*a*) for the words "paid to" the words "deposited with" shall be substituted;

(*b*) for the words "for the benefit of", where they occur for the first time, the words "which has been awarded to or may be due to" shall be substituted;

(*c*) after the word "receipt" the word "distribution" shall be inserted;

(*d*) for the word "awarded" the word "deposited" shall be substituted; and

(*e*) for the words "and applicable for the benefit of" the words "which has been awarded to or may be due to" shall be substituted.

(2) To the said section as so re-numbered the following proviso shall be added, namely:—

"Provided that no sum deposited under this Act in respect of fatal accidents shall be so transferred without the consent of the employer concerned until the Commissioner receiving the sum has passed orders determining its distribution and apportionment under the provisions of sub-section (4) and sub-section (5) of S. 8".

(3) After the said section as so re-numbered the following sub-section shall be added, namely:—

"(2) Where money deposited with a Commissioner has been so transferred in accordance with the rules made under this section, the provisions elsewhere contained in this Act regarding distribution by the Commissioner of compensation deposited with him shall cease to apply in respect of any such money".

THE CODE OF CIVIL PROCEDURE (AMENDMENT) ACT, 1937.

ACT No. VIII OF 1937.

[*4th March,* 1937.

An Act further to amend the Code of Civil Procedure, 1908, *for certain purposes.*

WHEREAS it is expedient further to amend the Code of Civil Procedure, 1908, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE CODE OF CIVIL PROCEDURE (AMENDMENT) ACT, 1937.

(2) It shall come into force on such date as the Governor-General in Council may, by notification in the Gazette of India, appoint.

Insertion of new S. 44-A in Act V of 1908.

2. After S. 44 of the Code of Civil Procedure, 1908, the following section shall be inserted, namely:—

Execution of decrees passed by Courts in the United Kingdom and other reciprocating territory.

"44-A. (1) Where a certified copy of a decree of any of the Superior Courts of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in British India as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of S. 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (*a*) to (*f*) of S. 13.

Explanation 1.—'Superior Courts', with reference to the United Kingdom, means the High Court in England, the Court of Session in Scotland, the High Court in Northern Ireland, the Court of Chancery of the County Palatine of Lancaster and the Court of Chancery of the County Palatine of Durham.

Explanation 2.—'Reciprocating territory' means any country, or territory, situated in any part of His Majesty's Dominions or in India, which the Governor-General in Council may, from time to time, by notification in the Gazette of India, declare to be reciprocating territory for the purposes of this section; and 'Superior Courts', with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 3.—'Decree', with reference to a Superior Court, means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, and

(*a*) with reference to Superior Courts in the United Kingdom, includes judgments given and decrees made in any Court in appeals against such decrees or judgments, but

(*b*) in no case includes an arbitration award, even if such award is enforceable as a decree or judgment".

Amendment of rule 22 of Order XXI of the First Schedule of Act V of 1908.

3. In rule 22 of Order XXI of the First Schedule of the Code of Civil Procedure, 1908, in 1 (*b*) after the words "party to the decree" the following shall be inserted, namely:—

"or where an application is made for execution of a decree filed under the provisions of S. 44-A".

THE CODE OF CIVIL PROCEDURE (SECOND AMENDMENT) ACT, 1937.

ACT No. IX OF 1937.

[*4th March*, 1937.

An Act further to amend the Code of Civil Procedure, 1908, *for certain purposes.*

WHEREAS it is expedient further to amend the Code of Civil Procedure, 1908, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE CODE OF CIVIL PROCEDURE (SECOND AMENDMENT) ACT, 1937.

Amendment of S. 60, Act V of 1908.

2. In the proviso to sub-section (1) of S. 60 of the Code of Civil Procedure, 1908,—

(*a*) for clauses (*h*) and (*i*) the following clauses shall be substituted, namely:—

"(*h*) the wages of labourers and domestic servants, whether payable in money or in kind; and salary, to the extent of the first hundred rupees and one-half the remainder of such salary;

(*i*) the salary of any public officer or of any servant of a railway company or local authority to the extent of the first hundred rupees and one-half the remainder of such salary:

Provided that, where the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree;";

(*b*) in clause (*k*), for the figures "1897" the figures "1925" shall be substituted;

(*c*) for clause (*l*) the following clause shall be substituted, namely:—

"(*l*) any allowance forming part of the emoluments of any public officer or of any servant of a railway company or local authority which the Governor-General in Council may by notification in the Gazette of India declare to be exempt from attachment, and any subsistance grant or allowance made to any such officer or servant while under suspension;";

(*d*) the *Explanation* at the end shall be re-numbered as *Explanation* 1 and, to the *Explanation* as so re-numbered the following words shall be added, namely:—

"and in the case of salary other than salary of a public officer or a servant of a railway company or local authority the attachable portion thereof is exempt from attachment until it is actually payable"; and

(*e*) after the *Explanation* as so re-numbered the following *Explanation* shall be added, namely:—

"*Explanation* 2.—In clauses (*h*) and (*i*), 'salary' means the total monthly emoluments, excluding any allowance declared exempt from attachment under the provisions of clause (*l*), derived by a person from his employment whether on duty or on leave."

Retrospective effect.

3. The amendments made by S. 2 shall not have effect in respect of any proceedings arising out of any suit instituted before the first day of June, nineteen hundred and thirty-seven.

THE INDIAN ELECTRICITY (AMENDMENT) ACT, 1937.

ACT No. X OF 1937.

[*4th March,* 1937.

An Act further to amend the Indian Electricity Act, 1910. *for certain purposes.*

WHEREAS it is expedient further to amend the Indian Electricity Act, 1910, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN ELECTRICITY (AMENDMENT) ACT, 1937.

(2) It shall come into force on such date as the Governor-General in Council may, by notification in the Gazette of India, appoint.

Application of Act.

2. The Indian Electricity Act, 1910 (hereinafter referred to as the said Act), shall, in its application to British India, including British Baluchistan and the Sonthal Parganas but excluding Burma, be amended in the manner hereinafter provided.

Insertion of new S. 36-A in Act IX of 1910.

3. After S. 36 of the said Act the following section shall be inserted, namely:—

Central Electricity Board.

"36-A. (1) A Board to be called the Central Electricity Board shall be constituted to exercise the powers conferred by S. 37.

(2) The Central Electricity Board shall consist of fifteen members, namely:—

(*a*) a chairman to be nominated by the Governor-General in Council;

(*b*) one member to be nominated by each of the Local Governments of Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces, Assam, the North-West Frontier Province, Sind and Orissa;

(*c*) one member, holding office for a period of three years, to be nominated alternately by the Local Government of Delhi and the Local Government of Ajmer-Merwara;

(*d*) one member to be nominated by the Chief Commissioner of Railways; and

(*e*) one member to be nominated by the Chief Inspector of Mines.

(3) Any vacancy occurring in the Board, otherwise than by the expiry of the term of office of the member referred to in clause (*c*) of sub-section (2), shall be filled as soon as may be by a nomination made by the authority by whom the member vacating office was nominated.

(4) The Board shall have full power to regulate by by-laws or otherwise its own procedure and the conduct of all business to be transacted by it.

(5) The powers of the Central Electricity Board may be exercised notwithstanding any vacancy in the Board."

Amendment of S. 37, Act IX of 1910.

4. In S. 37 of the said Act, for the words "Governor-General in Council", in both places where they occur, the words "Central Electricity Board" shall be substituted.

Amendment of S. 38, Act IX of 1910.

5. In S. 38 of the said Act,—

(*a*) sub-section (3) shall be omitted, and

(*b*) sub-section (4) shall be re-numbered as sub-section (3).

THE INDIAN BOILERS (AMENDMENT) ACT, 1937.

ACT No. XI OF 1937.

[*4th March,* 1937.

An Act further to amend the Indian Boilers Act, 1923, *for certain purposes.*

WHEREAS it is expedient further to amend the Indian Boilers Act, 1923, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN BOILERS (AMENDMENT) ACT, 1937.

(2) It shall come into force on such date as the Governor-General in Council may, by notification in the Gazette of India, appoint.

Application of Act.

2. The Indian Boilers Act, 1923 (hereinafter referred to as the said Act), shall, in its application to British India, including British Baluchistan and the Sonthal Parganas but excluding Burma, be amended in the manner hereinafter provided.

Amendment of S. 2, Act V of 1923.

3. In S. 2 of the said Act, after clause (*a*) the following clause shall be inserted, namely:—

"(*aa*) 'Board' means the Central Boilers Board constituted under S. 27-A:".

Insertion of new S. 27-A in Act V of 1923.

4. After S. 27 of the said Act the following section shall be inserted, namely:—

Central Boilers Board.

"27-A. (1) A Board to be called the Central Boilers Board shall be constituted to exercise the powers conferred by S. 28.

(2) The Board shall consist of fourteen members, namely:—

(*a*) a chairman to be nominated by the Governor-General in Council;

(*b*) one member to be nominated by each of the Local Governments of Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces, Assam, the North-West Frontier Province, Sind and Orissa;

(*c*) one member, holding office for a period of three years, to be nominated alternately by the Local Government of Delhi and the Local Government of Ajmer-Merwara; and

(*d*) one member to be nominated by the Chief Commissioner of Railways.

(3) Any vacancy occurring in the Board, otherwise than by the expiry of the term of office of the member referred to in clause (*c*) of sub-section (2), shall be filled as soon as may be by a nomination made by the authority by whom the member vacating office as nominated.

(4) The Board shall have full power to regulate by by-laws or otherwise its own procedure and the conduct of all business to be transacted by the Board.

(5) The powers of the Board may be exercised notwithstanding any vacancy in the Board."

Amendment of S. 28, Act V of 1923.

5. In section 28 of the said Act,—

(*a*) for the words "Governor-General in Council", in both places where they occur, the word "Board" shall be substituted; and

(*b*) after clause (*a*) the following clause shall be inserted, namely:—

"(*aa*) for prescribing the circumstances in which, the extent to which, and the condition subject to which variation from the standard conditions laid down under clause (*a*) may be permitted;"

THE CONTEMPT OF COURTS (AMENDMENT) ACT, 1937.

ACT No. XII OF 1937.

[10*th March,* 1937.

An Act to amend the Contempt of Courts Act, 1926, *for a certain purpose.*

WHEREAS it is expedient to amend the Contempt of Courts Act, 1926, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE CONTEMPT OF COURTS (AMENDMENT) ACT, 1937.

Amendment of preamble to Act XII of 1926.

2. In the preamble to the Contempt of Courts Act, 1926 (hereinafter referred to as the said Act), the word "subordinate" shall be omitted.

Amendment of S. 3, Act XII of 1926.

3. To section 3 of the said Act the following proviso shall be added, namely:—

"Provided further that notwithstanding anything elsewhere contained in any law no High Court shall impose a sentence in excess of that specified in this section for any contempt either in respect of itself or of a Court subordinate to it".

THE INDIAN TEA CESS (AMENDMENT) ACT, 1937.

ACT No. XIII OF 1937.

[13*th March,* 1937.

An Act further to amend the Indian Tea Cess Act, 1903, *for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Tea Cess Act, 1903, for the purpose of securing that the said Act should cease to be in force in Burma;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN TEA CESS (AMENDMENT) ACT, 1937.

Amendment of S. 1, Act IX of 1903.

2. To sub-section (2) of section 1 of the Indian Tea Cess Act, 1903, the words "and Burma" shall be added.

THE INDIAN LIMITATION (AMENDMENT) ACT, 1937.

ACT NO. XIV OF 1937.

[31*st March*, 1937.

An Act further to amend the Indian Limitation Act, 1908, *for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Limitation Act, 1908, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN LIMITATION (AMENDMENT) ACT, 1937.

Amendment of Art. 149, First Schedule to Act IX of 1908.

2. In Article 149 in the First Division of the First Schedule to the Indian Limitation Act, 1908, to the entry in the first column the following words shall be added, namely:—

"except a suit before the Federal Court in the exercise of its original jurisdiction".

THE INDIAN FINANCE ACT, 1937.

[31*st March*, 1937.

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the excise duty on sugar leviable under the Sugar (Excise Duty) Act, 1934, *to vary certain duties leviable under the Indian Tariff Act*, 1934, *to vary the excise duty on silver leviable under the Silver (Excise Duty) Act*, 1930, *to fix maximum rates of postage under the Indian Post Office Act*, 1898, *and to fix rates of income-tax and super-tax.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the excise duty on sugar leviable under the Sugar (Excise Duty) Act, 1934, to vary certain duties leviable under the Indian Tariff Act, 1934, to vary the excise duty on silver leviable under the Silver (Excise Duty) Act, 1930, to fix maximum rates of postage under the Indian Post Office Act, 1898, and to fix rates of income-tax and super-tax;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Fixation of salt duty.

2. The provisions of S. 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Governor-General in Council to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India other than Burma or Aden, be construed as if, for the year beginning on the 1st day of April, 1937, they imposed such duty at the

rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule made under that section.

Amendment of S. 3, Act XIV of 1934.

3. In sub-section (2) of section 3 of the Sugar (Excise Duty) Act, 1934,—

(*a*) in clause (*i*), for the words "ten annas" the words "one rupee and five annas" shall be substituted, and

(*b*) in clause (*ii*), for the words "one rupee and five annas" the words "two rupees" shall be substituted.

Amendment of the First Schedule to Act XXXII of 1934.

4. In the First Schedule to the Indian Tariff Act, 1934,—

(*a*) in Item No. 17, for the words and figures "Rs. 9-1 per cwt." in the fourth column the following words and figures shall be substituted, namely:—

"the rate at which excise duty is for the time being leviable on sugar, other than *Khandsari* or Palmyra sugar, produced in British India *plus* Rs. 7-4 per cwt.";

(*b*) in Items Nos. 61 (2) and 62 (1), for the words "two annas per ounce" in the fourth column the words "three annas per ounce" shall be substituted.

Amendment of S. 3, Act XVIII of 1930.

5. In sub-section (1) of section 3 of the Silver (Excise Duty) Act, 1930, for the words "two annas" the words "three annas" shall be substituted.

Inland Postage rates.

6. For the year beginning on the 1st day of April, 1937, the Schedule contained in the Schedule to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

Income-tax and super-tax.

7. (1) Income-tax for the year beginning on the 1st day of April, 1937, shall be charged at rates applicable to the total income of each assessee the same, and increased in each case by the same fraction of the amount of the rate, as for the year beginning on the 1st day of April, 1936.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1937, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the same rates, increased in each case by the same fraction of the amount of the rate, as for the year beginning on the 1st day of April, 1936.

(3) For the purposes of sub-section (1) "total income" means total income as determined in accordance with the provisions of the Indian Income-tax Act, 1922.

THE SCHEDULE.

Schedule to be inserted in the Indian Post Office Act, 1898.

(*See* Section 6.)

"THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

(*See* Section 7.)

Letters.

For a weight not exceeding one tola ...	One anna.
For every tola, or fraction thereof, exceeding on tola. ...	Half an anna.

Postcards.

Single ...	Nine pies.
Reply ...	One and a half annas.

Book, Pattern and Sample Packets.

For the first two and a half tolas or fraction thereof ...	Six pies.
For every additional two and a half tolas, or fraction thereof, in excess of two and a half tolas. ...	Three pies.

Registered Newspapers.

For a weight not exceeding ten tolas ...	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas ...	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas ...	Half an anna.

Parcels.

For a weight not exceeding forty tolas ...	Four annas.
For every forty tolas, or fraction thereof, exceeding forty tolas ...	Four annas.

THE INDIAN ARMY (AMENDMENT) ACT, 1937.

ACT NO. XV OF 1937.

[*5th April*, 1937.

An Act further to amend the Indian Army Act, 1911, *for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Army Act, 1911, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title. **1.** This Act may be called THE INDIAN ARMY (AMENDMENT) ACT, 1937.

Amendment of S. 2, Act VIII of 1911. **2.** In section 2 of the Indian Army Act, 1911,—

(*a*) to clause (*a*) of sub-section (1) the following proviso shall be added, namely:—

"Provided that a person holding a commission in the Army in India Reserve of Officers shall be so subject only when ordered on any duty or service for which he is liable as a member of such reserve force."; and

(*b*) to sub-section (2) the following proviso shall be added, namely:—

"Provided that an officer of the Indian Land Forces retired therefrom and appointed to the Indian Regular Reserve of Officers shall again become so subject when ordered on any duty or service for which he is liable as a member of such reserve force."

THE CODE OF CIVIL PROCEDURE (THIRD AMENDMENT) ACT, 1937.

ACT NO. XVI OF 1937.

[5th April, 1937.

An Act further to amend the Code of Civil Procedure, 1908, *for a certain purpose.*

WHEREAS it is expedient further to amend the Code of Civil Procedure, 1908, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE CODE OF CIVIL PROCEDURE (THIRD AMENDMENT) ACT, 1937.

Amendment of rule 3, Order XXXII, First Schedule to Act V of 1908.

2. In the First Schedule to the Code of Civil Procedure, 1908, in Order XXXII, to rule 3 the following sub-rule shall be added, namely:—

"(5) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional Court and any proceedings in the execution of a decree."

THE INDIAN RED CROSS SOCIETY (AMENDMENT) ACT, 1937.

ACT NO. XVII OF 1937.

[5th April, 1937.

An Act to amend the Indian Red Cross Society Act, 1920, *for certain purposes.*

WHEREAS it is expedient to amend the Indian Red Cross Society Act, 1920, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN RED CROSS SOCIETY (AMENDMENT) ACT, 1937.

Amendment of S. 8, Act XV of 1920.

2. Section 8 of the Indian Red Cross Society Act, 1920 (hereinafter referred to as the said Act), shall be re-numbered as sub-section (1) of that section, and to that section as so re-numbered the following sub-sections shall be added, namely:

"(2) The Governor-General in Council may, by notification in the Gazette of India, direct that any Province, State or other part of India specified in the first column of the Second Schedule shall be excluded therefrom or that any Province, State or other part of India not specified therein shall be included therein and that the percentages specified in the third column of the said Schedule shall be varied as required by any such exclusion or inclusion.

(3) On the issue of a notification under sub-section (2) the Second Schedule shall be deemed to be amended in accordance with such notification.

(4) No notification under sub-section (2) shall be made without the consent of every Branch Committee constituted in the Provinces, States and other parts of India for the time being included in the Second Schedule."

Substitution of new Schedule for the Second Schedule to Act XV of 1920.

3. For the Second Schedule to the said Act the following Schedule shall be substituted, namely:—

"SECOND SCHEDULE.

(*See* Section 8.)

Statement showing contributions made by Provinces and States in India to the Central "Our Day" Fund and the approximate percentage of their claim on the interest on the Capital Fund of the Joint War Committee, Indian Branch.

Names of Provinces, States, etc.	Amount of contribution.	Approximate percentage of claim on the interest of Capital Fund.
	Lakhs.	
United Provinces ..	15	18·70
Bombay ..	10 (Bombay, Western India States, Sind)	8·15
Western India States ..		3·14
Sind ..		1·25
Bengal ..	10	12·54
Punjab ..	11	13·47
Central Provinces ..	4	4·87
Bihar ..	$4\frac{1}{2}$	5·74
Orissa ..	1	1·08
Madras ..	$5\frac{3}{4}$	7·25
Rajputana ..	4	4·87
Central India ..	$3\frac{1}{3}$	3·80
Gwalior ..	$1\frac{1}{3}$	1·62
North-West Frontier ..	$2\frac{1}{4}$	2·70
Hyderabad (Deccan) ..	3	3·80
Assam ..	$1\frac{1}{4}$	1·62
Baluchistan ..	$1\frac{1}{4}$	1·62
Mysore ..	$1\frac{1}{4}$	1·62
Kashmir ..	1	1·08
Baroda ..	$\frac{1}{2}$	·54
Delhi ..	$\frac{2}{5}$	·54"

THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937.

ACT No. XVIII OF 1937.

[14*th April*, 1937.

An Act to amend the Hindu Law governing Hindu Women's Rights to Property.

WHEREAS it is expedient to amend the Hindu Law to give better rights to women in respect of property;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas but excluding Burma.

Application.

2. Notwithstanding any rule of Hindu Law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate leaving a widow.

Devolution of property.

3. (1) When a Hindu governed by the Dayabhag School of Hindu Law dies intestate his property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate pro-

perty that separate property shall, subject to the provisions of sub-section (3), devolve upon his widow along with his lineal descendants, if any, in like manner as it devolves upon a son:

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son:

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu Law other than the Dayabhag school or by customary law dies intestate having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession descends to a single heir or to any property to which the Indian Succession Act, 1925, applies.

Saving.

4. Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

THE ARYA MARRIAGE VALIDATION ACT, 1937.

ACT No. XIX OF 1937.

[14*th April*, 1937.

An Act to recognise and remove doubts as to the validity of inter-marriages current among Arya Samajists.

WHEREAS it is expedient to recognise and place beyond doubt the validity of inter-marriages of a class of Hindus known as Arya Samajists;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE ARYA MARRIAGE VALIDATION ACT, 1937.

(2) It extends to the whole of British India including British Baluchistan and the Sonthal Parganas, and applies also to all subjects of His Majesty within other parts of India, and to all Indian subjects of His Majesty without and beyond British India.

Marriage between Arya Samajists not to be invalid.

2. Notwithstanding any provision of Hindu Law, usage or custom to the contrary no marriage contracted whether before or after the commencement of this Act between two persons being at the time of the marriage Arya Samajists shall be invalid or shall be deemed ever to have been invalid by reason only

of the fact that the parties at any time belonged to different castes or different sub-castes of Hindus or that either or both of the parties at any time before the marriage belonged to a religion other than Hinduism.

THE REPEALING AND AMENDING ACT, 1937.

ACT NO. XX OF 1937.

[14th April, 1937.

An Act to amend certain enactments and to repeal certain other enactments.

WHEREAS it is expedient that certain amendments should be made in the enactments specified in the First Schedule;

AND WHEREAS it is also expedient that the enactments specified in the Second Schedule, which are spent or have otherwise become unnecessary, or have ceased to be in force otherwise than by expressed specific repeal, should be expressly and specifically repealed;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE REPEALING AND AMENDING ACT, 1937.

Amendment of certain enactments.

2. The enactments specified in the First Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

Repeal of certain enactments.

3. The enactments specified in the Second Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

Savings.

4. The repeal by this Act of any enactment shall not affect any Act or Regulation in which such enactment has been applied, incorporated or referred to; and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or fr[illegible]ny debt, penalty, obligation, liability, claim or demand or any indemnit[illegible]dy granted, or the proof of any past act or thing; nor shall this Act [illegible] principle or rule of law, or established jurisdiction, form or cour[illegible] pleading, practice or procedure, or existing usage, custom, privilege, res[illegible]tion, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed;

nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force.

THE FIRST SCHEDULE.

AMENDMENTS.

(*See* section 2.)

Year. 1	No. 2	Short title. 3	Amendments. 4
		Acts of the Governor-General in Council.	
1911	II	The Indian Patents and Designs Act, 1911.	In sub-section (*2*) of section 9, for the word "three" the word "four" shall be substituted.
1913	VII	The Indian Companies Act, 1913.	In sub-section (*1*) of section 93, after clause (*p*) the following word and clause shall be added, namely:— "and (*q*) where any part of the sums required for the matters set out in sub-section (*2*) of section 101 is to be provided out of sources other than share capital, particulars of the amount to be so provided and the sources thereof."
		Acts of the Indian Legislature.	
1922	XI	The Indian Income-tax Act, 1922.	In sub-section (2) of section 30, after the words "intimation of the refusal" the words, brackets, figures and letter "to pass an order under sub-section (*1*) of section 25-A, or" shall be inserted.
1923	XXI	The Indian Merchant Shipping Act, 1923.	In section 155, after clause (*e*) the following clause shall be inserted, namely:— "(*ee*) in the case of a ship which is to carry more than one hundred unberthed passengers, that she has on board a medical officer licensed in the prescribed manner;". In sub-section (*3*) of section 176, for the word "steam", wherever it occurs, the word "machinery" shall be substituted.
1926	XXIII	The Delhi Joint Water Board Act, 1926.	In sub-clause (*iii*) of clause (*c*) of section 2 and in item (*e*) of Schedule II, for the words "Cantonment Authority, Delhi New Cantonments" the words and brackets "Military Engineer Services, Delhi (New) Cantonments" shall be substituted.
1934	XXXII	The Indian Tariff Act, 1934.	In the First Schedule,— (*i*) in item No. 72 (*1*), in the entry in the second column, for the words "Jacquard harness linen cards" the words "Jacquard harness linen cords" shall be substituted; and (*ii*) in item No. 72 (*2*), in the entry in the second column, for the words "electric type blocks" the words "electro-type blocks" shall be substituted.
1936	IV	The Payment of Wages Act, 1936.	In section 17,— (*i*) in sub-section (*1*), for the word, brackets and figure "sub-section (*3*)" the words, brackets and figures "sub-section (*3*) or sub-section (*4*)" shall be substituted; and

Year. 1	No. 2	Short title. 3	Amendments. 4
		Acts of the Indian Legislature—contd.	
			(*ii*) in clause (*c*) of sub-section (*1*) and in sub-section (*2*), for the word, brackets and figure "sub-section (*5*)" the word, brackets and figure "sub-section (*4*)" shall be substituted. In section 24, for the words "employed by a railway administration" the words "employed by or under a railway administration" shall be substituted.

THE SECOND SCHEDULE.

REPEALS.

(*See* section 3.)

Year. 1	No. 2	Short title. 3	Extent of repeal. 4
		Acts of the Lieutenant-Governor of Bengal in Council.	
1864	VII	The Salt Act, 1864 ..	So much as has not been repealed.
1873	I	The Bengal Salt Act, 1873.	The whole.
		Acts of the Governor-General in Council.	
1885	XII	The Indian Sea Passengers Act, 1885.	So much as has not been repealed.
1885	XVIII	The Land Acquisition (Mines) Act, 1885.	Section 15.
1908	IX	The Indian Limitation Act, 1908.	Article 4 of Schedule I.
1913	VII	The Indian Companies Act, 1913.	In section 93, sub-section (*1C*).
1920	XLVII	The Imperial Bank of India Act, 1920.	Section 33.
		Acts of the Indian Legislature.	
1923	II	The Malabar (Completion of Trials) Supplementing Act, 1923.	The whole.
1923	XXI	The Indian Merchant Shipping Act, 1923.	Section 146. In clause (*e*) of section 155 the words "and, if she is to carry more than one hundred passengers to any such port, that she has on board a medical officer licensed in the prescribed manner". Schedule III.
1925	II	The Indian Finance Act, 1925.	So much as has not been repealed.
1926	XIX	The Indian Finance Act, 1926.	So much as has not been repealed.
1928	XIII	The Indian Mines (Amendment) Act, 1928.	The whole.
1929	V	The Workmen's Compensation (Amendment) Act, 1929.	The whole.
1929	VII	The Trade Disputes Act, 1929.	In clause (*k*) of section 2, the words "or in the Royal Indian Marine Service."

Year. 1	No. 2	Short title. 3	Extent of repeal. 4
		Acts of the Indian Legislature—contd.	
1930	XV	The Indian Finance Act, 1930.	In the long title and preamble, the words commencing with the words and figures "further to amend the Sea Customs Act, 1878", and ending with the words and figures "the Indian Post Office Act, 1898", and the words commencing with the words "to vary the excise duty" and ending with the words and figures "the Indian Finance Act, 1926". Sub-section (*3*) of section 1. Sections 2, 3, 5, 7, 8 and 9. Schedule II.
1931	XXI	The Indian Mines (Amendment) Act, 1931.	The whole.
1932	II	The Employers and Workmen (Disputes) Repealing Act, 1932.	The whole.
1932	IV	The Indian Finance (Supplementary and Extending) Amendment Act, 1932.	The whole.
1932	XXII	The Tea Districts Emigrant Labour Act, 1932.	Section 41 and the Schedule.
1933	VI	The Salt Additional Import Duty (Extending) Act, 1933.	The whole.
1933	VII	The Indian Finance Act, 1933.	In the long title and preamble, the words commencing with the words "to fix the duty on salt" and ending with the words and figures "the Indian Post Office Act, 1898" and the words and figures "and further to amend the Indian Paper Currency Act, 1923". Sections 2, 4 and 6. Schedule I.
1934	II	The Reserve Bank of India Act, 1934.	Sections 59, 60 and 61.
1934	IX	The Indian Finance Act, 1934.	In the long title and preamble, the words commencing with the words "to fix the duty on salt" and ending with the words and figures "the Indian Post Office Act, 1898" and the words commencing with the words "further to amend" and ending with the words, brackets and figures "the Silver (Excise Duty) Act, 1930". Sections 2, 4, 6 and 7. Schedule I.
1934	X	The Salt Additional Import Duty (Extending) Act, 1934.	The whole.
1934	XIII	The Trade Disputes (Extending) Act, 1934.	The whole.
1934	XXV	The Factories Act, 1934 ..	Section 82 and the Schedule.
1934	XXVI	The Bengal Criminal Law Amendment Supplementary (Extending) Act, 1934.	The whole.
1934	XXXII	The Indian Tariff Act, 1934.	Section 13. Schedule III.

Year. 1	No. 2	Short title. 3	Extent of repeal. 4
		Acts of the Indian Legislature—concld.	
1935	II	The Indian Tariff (Amendment) Act, 1935.	The whole.
1935	IV	The Salt Additional Import Duty (Extending) Act, 1935.	The whole.
1935	V	The Indian Mines (Amendment) Act, 1935.	The whole.
1935	XII	The Repealing and Amending Act, 1935.	The whole.
1936	III	The Parsi Marriage and Divorce Act, 1936.	Section 53.
		Acts of the Governor-General.	
1931	..	The Indian Finance Act, 1931.	In the long title and preamble, the words commencing with the words "to fix the duty on salt" and ending with the words, brackets and figures "the Motor Spirit (Duties) Act, 1917" and the words commencing with the words "to vary the excise duty on kerosene" and ending with the words, brackets and figures "the Silver (Excise Duty) Act, 1930". Sections 2, 5, 6, 8, 9 and 10. Schedule III.
1931	..	The Indian Finance (Supplementary and Extending) Act, 1931.	Sections 6 and 10.
1935	..	The Indian Finance Act, 1935.	In the long title and preamble, the words commencing with the words "to fix the duty on salt" and ending with the words and figures "the Indian Post Office Act, 1898" and the words commencing with the words "and to vary the excise duty" and ending with the words, brackets and figures "the Silver (Excise Duty) Act, 1930". Sections 2, 3, 4 and 6. Schedule I.
1935	..	The Criminal Law Amendment Act, 1935.	The whole.

THE INDIAN TARIFF (AMENDMENT) ACT, 1937.

ACT No. XXI OF 1937.

[*14th April,* 1937.

An Act further to amend the Indian Tariff Act, 1934, *for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Tariff Act, 1934, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN TARIFF (AMENDMENT) ACT, 1937.

Amendment of First Schedule, Act XXXII of 1934.

2. In the First Schedule to the Indian Tariff Act, 1934, for Item No. 10 (2) the following item shall be substituted, namely:—

"10 (2)	BROKEN RICE.	Protective.	Twelve annas per Indian maund of 82 2/7 lbs. avoirdupois weight.	..	March 31st, 1938."

THE PAYMENT OF WAGES (AMENDMENT) ACT, 1937.

ACT NO. XXII OF 1937.

[14th April, 1937.

An Act to amend the Payment of Wages Act, 1936, for a certain purpose.

WHEREAS it is expedient to amend the Payment of Wages Act, 1936, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE PAYMENT OF WAGES (AMENDMENT) ACT, 1937.

Amendment of S. 9, Act IV of 1936.

2. To S. 9 of the Payment of Wages Act, 1936, the following *Explanation* shall be added, namely:—

"*Explanation.*—For the purposes of this section, an employed person shall be deemed to be absent from the place where he is required to work if, although present in such place, he refuses, in pursuance of a stay-in strike or for any other cause which is not reasonable in the circumstances, to carry out his work."

THE PETROLEUM (BERAR EXTENSION) ACT, 1937.

ACT NO. XXIII OF 1937.

[7th October, 1937.

An Act to extend the Petroleum Act, 1934, to Berar.

WHEREAS in Berar the importation, possession and transport of petroleum and other substances are regulated by the Indian Petroleum Act, 1899, as applied to Berar by order made under the Indian (Foreign Jurisdiction) Order in Council, 1902;

AND WHEREAS the Indian Petroleum Act, 1899, was repealed in British India by, and was replaced by, the Petroleum Act, 1934, by which Act the import, transport, storage, production, refining and blending of petroleum and other inflammable substances are now regulated in the whole of British India except Berar;

AND WHEREAS it is expedient that the Indian Petroleum Act, 1899, in its application to Berar should be repealed and that the Petroleum Act, 1934, should be extended to Berar;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE PETROLEUM (BERAR EXTENSION) ACT, 1937.

Repeal in Berar of Act VIII of 1899 and extension of Act XXX of 1934.

2. The Indian Petroleum Act, 1899, as in force in Berar, is hereby repealed, and the Petroleum Act, 1934, is hereby extended to and declared to be in force in Berar.

Operation of rules.

3. Rules made and notifications issued under the Petroleum Act, 1934, and in force in British India at the commencement of this Act are hereby extended to and declared to be in force in Berar.

THE RULES AND REGULATIONS CONTINUANCE ACT, 1937.

ACT No. XXIV OF 1937.

[*7th October*, 1937.

An Act to provide for the continuance in force of certain rules and regulations.

WHEREAS it is expedient to provide for the continuance in force of certain rules made under the Indian Electricity Act, 1910, and certain regulations made under the Indian Boilers Act, 1923; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE RULES AND REGULATIONS CONTINUANCE ACT, 1937.

Continuance in force of rules and regulations made under Act IX of 1910 and Act V of 1923.

2. Rules made before the 31st day of March, 1937, under S. 37 of the Indian Electricity Act, 1910, and regulations made before the 28th day of March, 1937, under S. 28 of the Indian Boilers Act, 1923, by the Governor-General in Council shall, on and from the said dates respectively, be deemed to have been made under the said sections of the said Acts by the authority substituted for the Governor-General in Council by the Indian Electricity (Amendment) Act, 1937, and the Indian Boilers (Amendment) Act, 1937, respectively, and shall continue to be in force until superseded by rules or regulations made under the said sections of the said Acts by the Central Electricity Board or the Central Boilers Board, as the case may be.

THE FEDERAL COURT ACT, 1937.

ACT No. XXV OF 1937.

[*7th October*, 1937.

An Act to empower the Federal Court to make rules for regulating the service of processes issued by the Court.

WHEREAS it is expedient to confer upon the Federal Court a supplemental power which is necessary for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under the Government of India Act, 1935; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE FEDERAL COURT ACT, 1937.

Power of Federal Court to make rules.

2. The Federal Court may make rules for regulating the service of processes issued by the Court, including rules requiring a High Court from which an appeal has been preferred to the Federal Court to serve any process issued by the Federal Court in connection with that appeal.

THE MUSLIM PERSONAL LAW (*SHARIAT*) APPLICATION ACT, 1937.

ACT No. XXVI OF 1937.

[*7th October*, 1937.

An Act to make provision for the application of the Muslim Personal Law (Shariat) *to Muslims in British India.*

WHEREAS it is expedient to make provision for the application of the Muslim Personal Law (*Shariat*) to Muslims in British India; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937.

(2) It extends to the whole of British India excluding the North-West Frontier Province.

Application of Personal Law to Muslims.

2. Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained

under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *taluq, ila, zihar, lian, khula* and *mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (*Shariat*).

Power to make a declaration.

3. (1) Any person who satisfies the prescribed authority—

(*a*) that he is a Muslim, and

(*b*) that he is competent to contract within the meaning of S. 11 of the Indian Contract Act, 1872, and

(*c*) that he is a resident of British India,

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of this Act, and thereafter the provisions of S. 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

(2) Where the prescribed authority refuses to accept a declaration under sub-S. (1), the person desiring to make the same may appeal to such officer as the Provincial Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.

Rule-making Power.

4. (1) The Provincial Government may make rules to carry into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely :—

(*a*) for prescribing the authority before whom and the form in which declarations under this Act shall be made;

(*b*) for prescribing the fees to be paid for the filing of declarations and for the attendance at private residences of any person in the discharge of his duties under this Act; and for prescribing the times at which such fees shall be payable and the manner in which they shall be levied.

(3) Rules made under the provisions of this section shall be published in the official Gazette and shall thereupon have effect as if enacted in this Act.

Dissolution of marriage by Court in certain circumstances.

5. The District Judge may, on petition made by a Muslim married woman, dissolve a marriage on any ground recognised by Muslim Personal Law (*Shariat*).

Repeals.

6. Provisions of the Acts and Regulations mentioned below shall be repealed in so far as they are inconsistent with the provisions of this Act, namely :—

(1) S. 26 of the Bombay Regulation IV of 1827;
(2) S. 16 of the Madras Civil Courts Act, 1873;
(3) S. 37 of the Bengal, Agra and Assam Civil Courts Act, 1887;
(4) S. 3 of the Oudh Laws Act, 1876;
(5) S. 5 of the Punjab Laws Act, 1872;
(6) S. 5 of the Central Provinces Laws Act, 1875; and
(7) S. 4 of the Ajmere Laws Regulation, 1877.

THE INDIAN TARIFF (SECOND AMENDMENT) ACT, 1937.

ACT No. XXVII OF 1937.

[*7th October*, 1937.

An Act further to amend the Indian Tariff Act, 1934, *for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Tariff Act, 1934, for the purpose hereinafter appearing; It is hereby enacted as follows :—

Short title.

1. This Act may be called THE INDIAN TARIFF (SECOND AMENDMENT) ACT, 1937.

Amendment of First Schedule, Act XXXII of 1934.

2. (1) In the First Schedule to the Indian Tariff Act, 1934, Item No. 10 (1) and Item No. 11 (1) shall be omitted.

(2) This section shall have effect retrospectively as if it had come into force on the 1st day of April, 1937.

THE INDIAN SECURITIES (AMENDMENT) ACT, 1937.

ACT No. XXVIII OF 1937.

[*7th October*, 1937.

An Act further to amend the Indian Securities Act, 1920, *for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Securities Act, 1920, to enable the Reserve Bank of India to perform certain functions relating to the issue of duplicate, renewed, converted, consolidated or sub-divided securities; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN SECURITIES (AMENDMENT) ACT, 1937.

Amendment of S. 10, Act X of 1920.

2. In sub-S. (1) of S. 10 of the Indian Securities Act, 1920 (hereinafter referred to as the said Act), for the word "officer" the word "authority", for the word "his" the word "its", and for the word "him" the word "it" shall be substituted.

Amendment of S. 11, Act X of 1920.

3. In S. 11 of the said Act, for the word "officer", in both places where it occurs, the word "authority" shall be substituted.

Amendment of S. 12, Act X of 1920.

4. In S. 12 of the said Act and in the proviso thereto, for the word "officer", wherever it occurs, the word "authority" shall be substituted, and for the word "him", where it occurs for the first time, the word "it" shall be substituted.

Amendment of S. 13, Act X of 1920.

5. In S. 13 of the said Act,—

(*a*) in sub-S. (1),—

(*i*) for the word "officer" the word "authority" shall be substituted; and

(*ii*) in clause (*c*), for the word "his" the word "its", and for the word "he" the word "it" shall be substituted;

(*b*) in sub-S. (2), for the word "officer", in both places where it occurs, the word "authority" shall be substituted, and for the word "himself", where it occurs for the first time, the words "direct one of its officers to" shall be substituted; and

(*c*) in sub-S. (3), for the words "The prescribed officer" the words "The officer of the prescribed authority" shall be substituted.

Amendment of Ss. 15, 19 and 21, Act X of 1920.

6. In Ss. 15, 19 and 21 of the said Act, for the word "officer", wherever it occurs, the word "authority" shall be substituted.

Amendment of S. 24, Act X of 1920.

7. In clause (*g*) of sub-S. (2) of S. 24 of the said Act, for the words "officer who" the words "authority which" shall be substituted.